Proving Discrimination After *Croson* and *Adarand*: "If It Walks Like a Duck"

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GOVERNMENTAL DISCRIMINATION in favor of awarding public contracts to majority white-owned firms may be merely a lingering practice in some jurisdictions. However, the underutilization of minority-owned firms, as a result of overt and covert disparate treatment by majority white contractors in the private sector, remains a present day reality. Thirty years of government-sponsored affirmative action designed to remedy the effects of racial and gender discrimination against minority and female-owned businesses in the public sector has reached a plateau. The Supreme Court's application of strict scrutiny to race-based affirmative action programs at the state and local levels has had cataclysmic effects. Many state and local jurisdictions re-enacted affirmative action programs following the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*[1] In *Croson*, the Court invalidated the City of Richmond's minority and female-owned business program, where it found the program to be in violation of the

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1. 488 U.S. 469 (1989). Justice O'Connor authored the majority opinion in *Croson*. There were two plurality opinions—Rehnquist, C.J. and White, J. joined O'Connor, J.'s plurality opinion in Part II, and Rehnquist, C.J., White, J., and Kennedy, J. joined Parts III A and V.

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2]

In a six to three majority decision, the *Croson* Court ruled that state or local governments, which set aside a portion of public contract dollars exclusively for minority-owned firms, must be able to meet a strict scrutiny standard of review.[3] In *Croson*, the Court concluded that the City of Richmond had presented no evidence of racial discrimination on the part of the city or the city's prime contractors.[4] In setting forth the proper standard of review to be applied in such cases, the Court explained, "If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion."[5] A plurality of the Court in *Croson* recognized that a "state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."[6]

Following the Supreme Court's decision in *Croson*, "state and local governments have scaled back or eliminated altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers" to minority participation.[7] Although many jurisdictions re-enacted minority business enterprise ("MBE")[8] programs after conducting post-*Croson* disparity studies of discrimination within their jurisdictions, there has been a tidal wave of litigation regarding the issue of government-sponsored MBE programs.

The first prong of the *Croson* standard requires jurisdictions to show that there is a "strong basis in evidence" that discrimination exists.[9] Despite their conducting of extensive studies that have shown

2. *See Croson*, 488 U.S. at 505–06.

3. *See id.* at 493.

4. *See id.*

5. *Id.* at 509.

6. *Id.* at 491–92.

7. See Brent Simmons, Reconsidering Strict Scrutiny of Affirmative Action, 2 MICH. J. RACE & L. 51, 56 (1996); see also Docia Rudley & Donna Hubbard, What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39, 42 n.18 (2000). "Some jurisdictions abandoned the effort altogether because of the high expense associated with conducting disparity studies. Other jurisdictions altered their programs by adopting less intrusive race-neutral alternatives, such as relaxation of bonding requirements, providing access to financing, and simplifying bidding procedures." Id. at 93.

8. "MBE" shares a meaning similar to the terms "SDB" and "DBE," which will be introduced *infra*. The three terms will be used interchangeably.

9. *See, e.g.*, George R. La Noue, *The Impact of* Croson *on Equal Protection Law and Policy*, 61 ALB. L. REV. 1, 23 (1997).

the existence of disparities in public sector contracting, most jurisdictions have been unable to withstand judicial scrutiny under this first prong of the *Croson* standard.[10] Strict scrutiny requires a showing that there is a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination that has been fostered by the local industry affected by the MBE program at issue.[11] Since only a few jurisdictions have been able to demonstrate the requisite showing, strict scrutiny has been fatal to many MBE programs.

Reliance on a showing of the effects of public discrimination has been fruitless for local jurisdictions. Local governments, however, may be able to take remedial action when they can show that their own spending practices were or are exacerbating a pattern of private discrimination. Despite the ruling in *Croson*, the Supreme Court has not offered clear guidance as to what constitutes proof of such government-fostered private discrimination. As several commentators have observed, "*Cro*son . . . did not fully explain what types of private discrimination are remediable."[12]

Not only was there a lack of guidance set forth by the Court as to what constitutes private discrimination, but there was also little guidance offered regarding what is needed to prove public discrimination. As one writer observed, "The cases which follow *Croson* reflect the confusion on the part of both the courts and the local and municipal governments as to what amount of statistics, written testimony, and historical evidence is needed to satisfy the negative standard of

10. *See id.* at 34 (noting that in the first three years immediately following *Croson*, there was very little impact; thereafter, there were successful challenges to MBE programs, and since then, litigation has affected many more programs).

11. *See Croson*, 488 U.S. at 502. Affirmative action programs designed to assist female-owned businesses raise the issue of whether such programs serve important governmental interests, rather than whether they meet the strict scrutiny standard. In this context, something less than a "strong basis in evidence" showing is required. The Supreme Court has not sufficiently addressed this issue. Although, some lower courts have required jurisdictions to present probative evidence of discrimination against females to justify their gender-based programs. *See* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1010 (3d Cir. 1993).

12. Ian Ayers & Fredrick E. Vars, *When Does Private Discrimination Justify Affirmative Action?*, 98 COLUM. L. REV. 1577, 1584 (1998). The authors noted that societal discrimination does not create a factual predicate of discrimination on its own. The authors first attacked the idea that government-sponsored affirmative action can only be used to remedy government-perpetrated discrimination. The authors sought to establish a theory of proving private discrimination, in order to create a narrowly tailored affirmative action program, by offering three broad possible types of justifications: "causal," "but for," and "single market." *See id.* at 1584–87. *See also* discussion *infra* Part III.

Croson."[13] Circuit courts, the writer also noted, have demonstrated a "tendency towards feeling their way around the matter, like the blind lady of justice herself."[14] Most jurisdictions that have enacted post-*Croson* programs have relied on disparity studies to demonstrate the existence of public discrimination—and most of these jurisdictions have failed to meet the required showing of discrimination. MBE programs in Atlanta, Columbus, Philadelphia, Miami, Cleveland, San Francisco, Houston, and Chicago, to name a few, have failed to make the requisite showing of the existence of discrimination, or of the effects of past discrimination, in their respective localities.

The present day reality is that *Croson* and its application have been strict in theory and fatal in fact, despite Justice O'Connor's pronouncement in *Croson* that governments have the power to address the effects of racial discrimination.[15] However, federal courts have been less hostile towards federal affirmative action programs, as compared to local programs, having frequently found that the federal government has met the strict scrutiny standard. *Adarand Constructors, Inc. v. Pena*[16] and its sojourn through the appellate courts demonstrated the level of past effects of public and private marketplace discrimination required for the federal government to be able to hurdle the strict scrutiny standard of *Croson*.

For example, in *Adarand Constructors, Inc. v. Slater*,[17] the Tenth Circuit found that the United States Department of Transportation's ("DOT") Disadvantaged Business Enterprise ("DBE") Program was narrowly tailored and, therefore, constitutional.[18] The DBE program involved the DOT's use of race-based presumptions in awarding federal funds to state and local government transportation programs.[19]

13. Nicole Duncan, Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny, 26 COLUM. HUM. RTS. L. REV. 679, 684 (1995).

14. *Id.* at 680. *See also* Rudley & Hubbard, *supra* note 7, at 43 (noting that a number of questions were left open after *Croson* and, for many state and local governments, strict scrutiny has remained an amorphous concept).

15. *Croson*, 488 U.S. at 486–92.

16. 515 U.S. 200 (1995) [hereinafter *Adarand III*].

17. 228 F.3d 1147 (10th Cir. 2000) [hereinafter *Adarand VII*]. Appellant Adarand appealed the Tenth Circuit decision, asserting that the court of appeals misapplied the strict scrutiny standard and that the federal program was not narrowly tailored. The Supreme Court originally granted certiorari, but after oral argument, the Supreme Court dismissed the granting of certiorari as being "improvidently granted." Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001). The case has had a nine year history, beginning with Adarand Constructors v. Skinner, 790 F. Supp. 240 (D. Colo. 1992) [hereinafter *Adarand I*]. *See* discussion *infra* Part II.

18. *See Adarand VII*, 228 F.3d at 1187.

19. *See id.* at 1156.

A few federal courts have held similarly with respect to the federal government's showing of discrimination regarding MBE programs that are designed to assist disadvantaged minority and female enterprises. In such cases, courts have afforded greater deference to Congress, as compared to local governments and agencies, regarding Congress' authority to identify and address racial discrimination. These courts have found that the necessary factual predicate was met by Congress, and so have concluded that Congress' granting of remedial relief was legitimate in these instances. Hence, the question has arisen: why have local jurisdictions been unable to meet *Croson*'s strict scrutiny standard, where the same constitutional standard of equal protection is to be applied to both federal and local governments?[20]

This article will address the problems local jurisdictions face in attempting to meet the showing of proof of discrimination required under the *Croson* strict scrutiny standard. Part I of this article will address the Supreme Court's opinion in the *Croson* case and the attempts by state and local jurisdictions to meet the strict scrutiny standard. An analysis of lower federal court opinions will show the lack of standards set forth by courts regarding what is required of jurisdictions for them to be able to show that a strong basis in evidence of discrimination exists to warrant a race-based remedy. Part II of this article will focus on the application of strict scrutiny to the federal government's demonstration of proof of discrimination under the requirements of *Adarand VII*. Part III will address the absence of a concrete model of proof for jurisdictions and courts to rely upon regarding the "strong basis in evidence" standard. It will also review the attempts made by local jurisdictions to demonstrate private sector discrimination within their own jurisdictions, as permitted by *Croson*. The major conclusions of this article will demonstrate that the *Croson* strict scrutiny standard has been an impossible burden for local governments to meet, regarding their ability to prove the existence of public sector discrimination against minority and female-owned businesses. The only viable and effective way for local governments to meet *Croson*'s strict scrutiny standard is for them to show that they have passively participated in demonstrated private sector discrimination. Race and gender discrimination continues to permeate the busi-

20. The Court in *Adarand III*, in fact, squarely answered the question of whether different constitutional standards apply to state and federal governments. The Court in *Adarand III* held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand III*, 515 U. S. at 227. *See* discussion *infra* Part II.

ness and construction markets, and local jurisdictions, as well as the federal government, should not be powerless to act to eradicate it.

I. *Croson* and the Application of Strict Scrutiny of Race-Based Business Programs

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court established the principle that racial classifications used by state or local governments, whether for invidious purposes or in the form of benign affirmative action plans, are governed by the Equal Protection Clause and are subject to strict judicial scrutiny.[21] In a six to three majority decision, the *Croson* Court held that state and local programs which allocate or set aside a portion of public contracting dollars to MBEs must be able to meet this standard of review.[22] Justice O'Connor, writing for the majority, stated that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."[23] For the first time, a majority of the Supreme Court resolved the issue of the appropriate standard of review for courts to use regarding government-sponsored affirmative action programs.[24]

The strict scrutiny or "color-blind" approach to adjudging the constitutionality of race-based affirmative action programs requires a showing of a compelling governmental interest by the state or locality attempting to institute such a program. Additionally, the approach mandates that the programs be narrowly tailored to achieve the jurisdictions' asserted governmental interests.[25]

This watershed case spurred a national debate on the future of affirmative action at local levels and the obligation upon local governments to meet the heightened standard of strict scrutiny. While the Court did not disavow the use of race-conscious remedies to address the problem of racial discrimination, *Croson* nonetheless marked a

21. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

22. *See id.*

23. *Id.* at 494 (relying on holding in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986)).

24. In Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990), the Court upheld the use of an intermediate standard of review regarding federal programs that involved the use of race-based classifications. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Court left unresolved the proper level of scrutiny, strict or intermediate, to be applied to race-based classifications. *See generally* Simmons, *supra* note 7 (critiquing recent Supreme Court rulings applying strict scrutiny as the proper standard for affirmative action programs).

25. See Croson, 488 U.S. at 484; see also Darlene C. Goring, Private Problem, Public Solution: Affirmative Action in the 21st Century, 33 AKRON L. REV. 209, 242 (2000).

change in the Court's willingness to treat racial classifications differently than other types of classifications.

A. Compelling Governmental Interest

In *Croson*, the Court struck down the City of Richmond's minority set-aside program because the city had failed to provide the adequate evidentiary showing of past and present discrimination needed to demonstrate a compelling governmental interest under strict scrutiny.[26] The Richmond program at issue required majority contractors seeking to do business with Richmond to submit minority business utilization plans. Within these plans, majority contractors had to show that at least thirty percent of their contract dollars, for a particular project, would be awarded to MBEs.[27] Croson, a majority-owned mechanical plumbing and heating contractor, submitted a bid for the installation of urinals and water faucets for the city jail that did not include the required minority utilization plan.[28] Although Croson had solicited MBEs for their involvement in its project, Croson ultimately requested a waiver from the city's program and submitted a bid that did not include MBE-participation information because the costs of subcontracting MBEs would have increased the overall cost of Croson's bid.[29] Richmond rejected Croson's bid and refused to grant a waiver to Croson.[30]

Thereafter, Croson brought an action against the city, arguing that the Richmond plan was unconstitutional.[31] The district court upheld the plan, as did the Fourth Circuit Court of Appeals, applying a deferential standard of review.[32] The Fourth Circuit determined that national findings of discrimination in the construction industry, in conjunction with the statistical study offered by the city that showed that low numbers of minority participants in contracting were the result of discrimination, served as a reasonable basis for the city's reme-

26. *See Croson*, 488 U.S. at 505.

27. The City of Richmond's Minority Business Plan included the following languarge: "To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." *Id.* at 478–79 (quoting J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 197 (4th Cir. 1985) [hereinafter *Croson I*]).

28. *See Croson* at 481–82.

29. *See id.* at 482–83

30. *See id.*

31. *See id.* at 483.

32. *See Croson I*, 779 F.2d at 190.

dial efforts.[33] The court then considered whether the program was narrowly tailored, focusing on the numerical racial quota used by the city and the quota's correlation to the discrimination the city sought to alleviate.[34] The court of appeals analyzed the thirty percent "set-aside" not in relation to the number of MBEs in Richmond, but to the percentage of minority persons in the city's population.[35] The court of appeals upheld the thirty percent figure, finding that it was "reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond."[36]

On appeal, the Supreme Court vacated the decision of the Fourth Circuit in light of the Court's plurality decision in *Wygant v. Jackson Board of Education*.[37] On remand, a divided Fourth Circuit court found Richmond's program unconstitutional, holding that proof of societal discrimination did not provide justification for the city's program.[38] Relying on *Wygant*, the Fourth Circuit court concluded that Richmond was required to demonstrate "prior discrimination *by the government unit involved.*"[39] According to the court of appeals, a debate that followed a Richmond City Council meeting "revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements made by a member of the public."[40] Even if the city had demonstrated a compelling interest for the use of the race-based "quota," the court concluded that the thirty percent set aside was not narrowly tailored to accomplish the city's asserted remedial purpose.[41] Richmond appealed the Fourth Circuit's ruling.

33. *See id.*

34. *See id.* at 192.

35. See *id.* at 190.

36. *Id.*

37. *See* J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)). In *Wygant*, white teachers challenged an affirmative action policy adopted by the local school board and a teachers' union, which provided a limited form of protection to minority teachers in the event of a lay off. *See Wygant*, 476 U.S. at 269–70. The policy provided that in the event of a layoff, minority teachers would not be laid off less than their percentage of minority personnel employed. *See id.* A four person plurality of the Court found that the program violated the Equal Protection Clause because the board and the union had failed to first show "prior discrimination by the governmental unit involved." *See id.* at 274.

38. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358 (4th Cir. 1989) [hereinafter Croson II].

39. *Id.* (quoting Wygant, 476 U.S. at 274).

40. Croson II, 822 F.2d at 1358. The court of appeals in Croson II found that the core of the holding of the Supreme Court's opinion in Wygant requires jurisdictions to show that their plans are justified by a compelling governmental interest. *See id.* at 1357.

41. *See id.* at 1358.

Relying on an approach similar to that used by the Supreme Court plurality in *Wygant*, Croson argued that Richmond or anybody wishing to employ any race-based remedy must be limited to "eradicating the effects of its own prior discrimination."[42] Richmond, on the other hand, argued that the city had the authority to "define and attack the effects of prior discrimination in its local construction industry."[43] The resolution of this case, defining the extent to which a local jurisdiction may take action to eradicate discriminatory conduct within its own jurisdiction, had far-reaching implications for the future of affirmative action plans. As will be discussed *infra*, whether plans were developed based on proof of discrimination by the government entity itself or proof of private marketplace-fostered discrimination would determine the legitimacy and ultimate constitutionality of the remedy itself.

In its *Croson* opinion, the Supreme Court initially addressed the question of the scope of the city's power to adopt legislation to address the effects of past discrimination.[44] According to the Court, empowering states to have equal authority with Congress would insulate any social classifications from judicial scrutiny under Section One of the Fourteenth Amendment.[45] In disagreeing with Justice Marshall's dissent, the *Croson* majority pointed out that it did not view Section Five of the Fourteenth Amendment as a form of "federal pre-emption in matters of race."[46] Accordingly, the Court asserted that state and local jurisdictions were not powerless to act to remedy the effects of past discrimination.[47]

The Court next gave its final approval regarding a local jurisdiction's authority to legislate to eradicate private discrimination. The Court stated, "It would seem . . . clear . . . that a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."[48] The Court distinguished *Croson* from *Wygant*, which had held that the Equal Protection Clause requires some showing of prior discrimination by the government unit involved.[49] In *Croson*, Justice O'Connor asserted:

42. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989).
43. *Id.*
44. *See id.*
45. *See id.* at 490.
46. *Id.* at 491.
47. *See id.*
48. *Id.* at 491–92.
49. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. at 267, 274 (1986).

> [T]he *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved.". . . To this extent, on the question of the city's competence, the Court of Appeals erred in following *Wygant* by rote in a case involving a state entity which has state-law authority to address discriminatory practices within local commerce under its jurisdiction.[50]

O'Connor further provided that,

> [I]f the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.[51]

Passive participation by a local government in private discriminatory conduct thus provides a constitutional basis for a government to address that discrimination. As will be discussed in Part III, *infra*, several jurisdictions, after having failed to demonstrate discrimination by the government unit itself, have begun to focus on the passive-participation theory of discrimination.[52] Nonetheless, many federal circuit courts continue to insist that governmental units can only use affirmative action to remedy their own active acts of discrimination.[53]

The Court in *Croson* next applied strict scrutiny as a basis for evaluating Richmond's MBE program.[54] After noting that the Equal Protection Clause guarantees and protects rights that are personal, the Court stated that "the Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based

50. *Croson*, 488 U.S. at 492.

51. *Id.* at 492. A plurality of the Court concluded that the state and local subdivisions had a compelling interest in remedying identified discrimination, past and present. *See also* Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (explaining that the Court in *Croson* had confirmed that the Fourteenth Amendment permits race-conscious relief aimed at eradicating discriminatory conduct and prevents the government from being a passive participant in such conduct).

52. *See generally* Ayers & Vars, *supra* note 12 (discussing the different theories a jurisdiction may use to demonstrate that it has been a passive participant in carrying out discrimination within its borders).

53. *Id.* Authors Ayers and Vars noted that if affirmative action programs are to pass constitutional muster in the future, it will be because of proof of underutilization of MBEs in private markets: "Thus, our focus on private discrimination is not just a nice question of law—it is likely to become the critical question in deciding the future of the federal government's 10 billion dollar race-conscious procurement programs." *Id.* at 1584.

54. *See Croson*, 488 U.S. at 493.

solely upon their race."[55] For the first time, the Court elevated the equal protection concept of protecting discrete and insular minorities to protecting the rights of individuals, regardless of whether they are considered a discrete and insular minority. Justice O'Connor stated: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[56]

The Court was concerned that the "political majority [in Richmond] may have acted to disadvantage a minority based on unwarranted assumptions."[57] Based on this concern, the Court determined that there was a need for "heightened judicial scrutiny in this case," and that equal protection concerns were equally applicable to all individuals.[58] As will be demonstrated, and indeed as the Court later indicated in *Adarand III*, all racial classifications, whether set forth for affirmative action purposes or based on invidious discrimination, carry a presumption of illegitimacy.[59]

In defending its program, Richmond relied on proof it had gathered regarding discrimination against black contractors in the construction industry, which had been and was currently being carried out by national, state, and local actors and entities.[60] It chiefly relied on evidence regarding the disparity of blacks in the construction industry as compared to the number of blacks in the general population.[61] The Court noted that, while the "factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary,"[62] when the city uses a suspect classification, "it cannot rest upon a generalized assertion as to the classification's relevance to its goals."[63]

The Court asserted that the City's "[r]eliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond is . . . misplaced."[64]

55. *Id.*
56. *Id.*
57. *Id.* at 473.
58. *See id.* at 496.
59. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 [*Adarand III*].
60. *See Croson*, 488 U.S. at 498–99.
61. *See id.*
62. *Id.* at 500.
63. *Id.*
64. *Id.*

The Court recognized that "statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination."[65] However, the Court cautioned that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[66]

The Court explicitly noted that the disparate impact model, used in reviewing Title VII employment discrimination cases, would be an appropriate model for courts to use to determine whether sufficient statistical proof of discrimination has been presented.[67] "There is no doubt that 'where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination under Title VII.'"[68] However, where special qualifications are concerned, the Court noted that comparisons "to the general population . . . may have little probative value."[69]

According to the Court, Richmond had not presented any evidence regarding the number of "MBE's in the relevant market . . . qualified to undertake prime or subcontracting work in public construction projects."[70] Nor, the Court pointed out, did the city know "what percentage of total city construction dollars minority firms now [received] as subcontractors on prime contracts let by the City."[71]

The Court further noted that Richmond's "[setting aside] of subcontracting dollars seem[ed] to rest on the unsupported assumption that white prime contractors simply [would] not hire minority firms."[72] As the lower courts have demonstrated since *Croson*, such assumptions would not be able to withstand judicial scrutiny regarding any type of racial classifications in the construction industry. Additionally, evidence of a lack of MBE membership in local contractors' associations, standing alone, would not be probative of discrimination in the local construction industry.[73] The Court stated that for such evidence to be relevant, the city would have to link the evidence "to

65. *Id.*

66. *Id.* at 501 (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) and Johnson v. Transp. Agency, 480 U.S. 616, 651–652 (1987)).

67. *See Croson*, 488 U.S. at 501.

68. *Id.* at 501 (quoting *Hazelwood*, 433 U.S. at 307–08).

69. *Croson*, 488 U.S. at 501 (quoting *Hazelwood*, 433 U.S. at 308).

70. *Croson*, 488 U.S. at 502.

71. *Id.*

72. *Id.*

73. *See id.* at 471 (O'Connor, J., plurality opinion). Although this was part of the plurality opinion, a majority of the justices accepted private discrimination as a constitution-

the number of MBE's eligible for membership."[74] An inference of discriminatory exclusion could arise if there was a statistical disparity between eligible MBEs and MBE membership in trade associations. In such a case, the Court noted that "the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market."[75]

Justice O'Connor's opinion provided support for the proposition that state and localities may take action to remedy private discrimination "when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination."[76] She explained, however, that when jurisdictions are acting along these lines, "they must identify that discrimination, public and private, with some specificity before they may use race conscious relief."[77]

The Court concluded that none of the evidence presented by the City pointed to the existence of discrimination against blacks in the construction industry.[78] Reliance on societal discrimination alone as the basis for the contracting program, according to the Court, would "open the door to competing claims for 'remedial relief' for every disadvantaged group."[79] The Court held that the city had failed to demonstrate a compelling interest in apportioning contract opportunities on the basis of race.[80]

Moreover, the Court asserted, there was "*absolutely no evidence* of past-discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons in any aspect of the Richmond construction

ally sufficient rationale for creating an MBP. *See also* Ayers & Vars, *supra* note 12 at 1641 n.11.

74. *See Croson*, 488 U.S. at 505.

75. *Id.* at 503 (citing Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 171 (6th Cir. 1983), where the court upheld a district court's finding that the State of Ohio had become "'a joint participant' with private industry and certain craft unions in a pattern of racially discriminatory conduct which excluded black laborers from work on public construction projects"). In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court upheld a federal public works program which set aside ten percent of federal monies to be used by states and localities in procuring services or supplies from certain identified minority groups. *See id.* at 491–92. In upholding the federal program under an intermediate standard of review, the Court noted that Congress had an abundant historical basis from which it could have concluded that traditional practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. *See id.* at 478. Congress had presented evidence of a nationwide history of past discrimination that had reduced minority participation in federal contracts. *See id.* at 458–67.

76. *Croson*, 488 U.S. at 504.

77. *Id.*

78. *See id.* at 505.

79. *Id.*

80. *See id.*

industry."[81] That the district court took judicial notice of the fact that most minorities in Richmond were black did not obviate the need for the city to identify the groups who had actually been victims of discrimination.[82] The Court speculated that the city's random inclusion of such groups, who may have never suffered from discrimination in the construction industry, could suggest that the city's actual purpose in enacting its MBE program was not to remedy discrimination.[83] This apparent "gross over-inclusiveness" raised a concern that the city's claim of remedial motivation was pretextual, rather than actual.[84]

B. Narrowly Tailoring

With regard to the second prong of the strict scrutiny test, the Court held that the Richmond's program was not narrowly tailored to redress the effects of identified discrimination.[85] First, the Court noted that nothing in the record indicated any consideration on the part of the city, when it created the program, of using race-neutral means instead of race-based classifications to increase minority business participation in city contracting.[86] The Court noted that many of the barriers to minority participation in the construction industry evidenced in this particular case appeared to have been "race-neutral," such as minorities' being unable to meet bonding requirements or to gain access to capital.[87] According to the Court, "If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program would . . . lead to greater minority participation."[88]

The Court also criticized Richmond's adherence to a rigid number quota, which was unrelated to any identified discrimination.[89] The city had not inquired into whether or not the particular MBE seeking a racial preference "ha[d] suffered from the effects of past discrimination by the city or prime contractors."[90] Despite the City of Richmond's failure to identify specific discrimination or to consider race-neutral programs prior to adopting race-based remedies, the Court concluded that the City of Richmond was not prohibited from taking

81. *Id.* at 506.
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.* at 508.
86. *See id.* at 507.
87. *See id.*
88. *Id.*
89. *Id.* at 508.
90. *Id.*

action to rectify the effects of identified discrimination within its jurisdiction.[91] O'Connor stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise . . . . Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria . . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliverable exclusion.[92]

Because Richmond had failed to identify the need for remedial action, its MBE program was found to be in violation of the Equal Protection Clause.[93]

Justice Marshall's dissent in *Croson*, which was joined by Justices Brennan and Blackmun, is noteworthy in many respects. Justice Marshall believed that the city had a compelling interest in remedying past discrimination and had demonstrated such necessity-based evidence, which was "'strong,' 'firm' and 'unquestionably legitimate,'" to support its program.[94] Importantly, he also felt that Richmond had a second compelling interest in "preventing the city's own spending decisions from reinforcing and perpetrating the exclusionary effects of past discrimination."[95] Justice Marshall wrote:

> When government channels all its contracting funds to a white-dominated community of established contractors whose racial homogeneity is the product of private discrimination, it does more than place its *imprimatur* on the practices which forged and which continue to define that community. . . . In my view, the interest in ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is every bit as strong as the interest in eliminating private discrimination.[96]

91. *See id.* at 509.

92. *Id.* at 509 (citations omitted).

93. *See id.* at 511.

94. *Id.* at 540 (Marshall, J., dissenting).

95. *Id.* at 537.

96. *Id.* at 538. Justice Marshall also disagreed with the "majority's dismissal of the congressional and Executive Branch findings in *Fullilove* as having 'extremely limited' probative value in this case." *Croson*, 488 U.S. at 546. Marshall believed that the majority's

Justice Marshall's focus on local government's spending to effectively reinforce private marketplace discrimination remains a viable focus after *Croson*, with regard to court determinations on whether a jurisdiction's program serves a compelling governmental interest. Marshall believed that evidence that only 0.67% of public construction dollars had gone to minority-owned prime contractors in Richmond, coupled with descriptive testimony from Richmond's elected and appointed leaders regarding discrimination in the city, established the link necessary for the city to be able to prove that discriminating practices had taken place.[97]

Following *Croson*, remedying the effects of past discrimination carried out by a governmental body itself, or by the private market, has become a compelling governmental interest sufficient to justify affirmative race-based classifications in public procurement. The *Croson* Court maintained that a jurisdiction may attempt to show that certain past effects of discrimination amount to identified discrimination, which jurisdictions may remedy.[98] However, the Court asserted that it might be inappropriate for that jurisdiction to use direct evidence of societal discrimination or misplaced statistical comparisons of the number of minorities in the construction business to the general population to make that showing.[99] Unfortunately, the Court did not formulate a clear framework for courts to follow when they are determining whether a government has made a sufficient showing regarding the discriminatory effects alleged to exist or have existed in the public or private workplace in question. Notwithstanding *Croson*, many federal circuits insist that governmental units can only use affirmative action to remedy public discrimination that it has, itself, perpetrated.[100]

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decision "would require cities seeking to eradicate the effects of past discrimination within their borders to . . . engage in unnecessarily duplicative, costly, and time-consuming factfinding." *Id.* at 750. He continued, "No principle of federalism or federal power, however, forbids a state or local government to draw upon a nationally relevant historical record prepared by the Federal Government." *Id.* at 547 (citations omitted).

97. *See id.* at 540. As will be demonstrated *infra*, in Part III, the Court has engaged in less-than-rigorous scrutiny of congressional findings with respect to identifiable discrimination under *Croson*—the body of evidence necessary to justify congressional action has been different from that required of local and state governments.

98. *See id.* at 501.

99. *See id.*

100. *See, e.g.*, Associated Gen. Contractors v. City & County of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996) (holding that the City of Columbus had failed to establish a strong basis in evidence of the existence of past discrimination that had carried out by the city).

One commentator observed, "[At least] ten federal circuit and district courts . . . have favorably quoted the *Wygant* language limiting race-conscious remedies to the 'government unit involved.'"[101] One of these federal courts has remarked, "Although *Croson* places the burden of production on the municipality to demonstrate a 'strong basis in evidence' . . . the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination."[102] However, other courts have made it clear that, in their view, public jurisdictions need not show proof of actual discrimination under *Croson*.[103]

C. Local Jurisdictions' Attempts to Satisfy *Croson*

How can a jurisdiction show that a strong basis in evidence of discrimination against minority contractors exists or existed so that the jurisdiction may justify its implementation of a race-based remedial business program? The Court has not established any significant model upon which a factual predicate of discriminatory practices may be based. Accordingly, many questions remain: What factors are relevant to this analysis? Is the historical treatment of minority contractors and subcontractors in the public and private marketplace relevant? Is the existence of barriers to minority business formation in the construction subcontracting industry relevant? Is racial discrimination, regarding minority access to funding, capital, and bonding in a jurisdiction, relevant to the inquiry, if findings of such conduct are based on localized evidence? The issues involved in these questions, and the Court's treatment of proof of discrimination in other contexts, such as voting and employment, will be discussed in Part III of this article.

101. Ayers & Vars, *supra* note 12, at 1641 n.17.

102. Concrete Works of Colo. v. City & County of Denver, 36 F.3d at 1522 (10th Cir. 1994) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 292 (1986)).

103. *See* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6. F.3d at 1002 n.10 (3d Cir. 1993), where the court of appeals criticized the district court for interpreting *Croson* "to require 'specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit' enacting the ordinance" (alteration in original) (citation omitted). This reading, according to the court of appeals, overlooked the "statement in *Croson* that a City can be a '*passive participant*' in private discrimination by awarding contracts to firms that practice racial discrimination." *Id.* (citations omitted); *see also* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 600 (3d Cir. 1996) ("A city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination.").

Many jurisdictions, following *Croson*, have adopted the use of disparity studies to assess the disparity, if any, between the availability and utilization of minority-owned businesses in government contracting.[104] Moreover, lower courts have relied on such disparity studies to evaluate jurisdictions' claims of discrimination to determine whether such claims warrant race-based remedies.[105] Such studies now number in the hundreds nation-wide, costing jurisdictions hundreds of thousands of dollars.[106]

D. Statistical Quagmire

Although *Croson* did not hold that any specific type of proof was required for a city to be able to meet its burden of proof, the Supreme Court implied that statistical comparisons would be appropriate.[107] No court has adopted a precise mathematical formula to assess the quantum of evidence necessary to establish a strong basis in evidence sufficient to meet the strict scrutiny standard. Statistical evidence can give rise to inferences of discrimination if the evidence demonstrates a significant statistical disparity between the number of qualified and available minority contractors in a particular locality and the number of minority contractors or subcontractors engaged by the locality or the locality's contractor.[108] In considering whether such statistical evidence gives rise to circumstantial evidence of discrimination, courts have generally used a disparity index to measure utilization.[109]

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104. *See, e.g., Concrete Works*, 36 F.3d 1513.

105. *See, e.g.*, Contractors Ass'n of E. Pa., Inc. v. City of Phila., 893 F. Supp. 419 (E.D. Pa. 1995); Eng'g Contractors Ass'n of Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1543 (S.D. Fla. 1996); Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996).

106. *See* La Noue, *supra* note 9, at 13. La Noue reported 140 such disparity studies, which employed different analytical and statistical analyses to demonstrate the existence of discrimination in the public and private marketplace. Several commentators have criticized the disparity studies as non-objective studies that were designed to be briefs for MBE programs and functioned as insurance policies to discourage litigation involving the programs.

107. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).

108. *See id.* at 509 (O'Connor, J., plurality opinion); *see also Contractors Association*, 6 F.3d at 1006.

109. *See, e.g., Concrete Works*, 36 F.3d at 1524 n.10. The court there explained,

> The disparity index is calculated by dividing the percentage of MBE and WBE participation in city contracts by the percentage of MBEs and WBEs in the relevant population of local construction firms. A disparity index of 1 demonstrates full MBE and WBE participation, whereas the closer the index is to zero, the greater the MBE and WBE underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full MBE and WBE utilization; . . . .

In order to adequately assess statistical evidence, there must be evidence identifying minority contractors who are ready, willing, and able to perform the particular jobs at issue.[110] Courts must then determine the relevant statistical pool from which a jurisdiction could have properly based its statistical comparisons regarding the types of firms that are being hired for particular jobs.[111] Determining who is qualified, willing, and able to perform the particular tasks at issue is one of the pillars of establishing the factual predicate necessary for jurisdictions to be able to withstand strict scrutiny.[112] This element is referred to as "availability."[113]

Following *Croson*, lower courts have applied different standards, and have considered numerous variables to determine "availability." Some courts have relied on census data to determine available contractors, while other courts have used "bidding data" or "vendor lists."[114] Bidding data contains information on the number of minority and majority firms actually bidding on public contracts,[115] while vendor lists include the names of firms or companies who have either pre-qualified, or have simply listed their qualifications, with the jurisdictions in which they do business.[116] No consensus has emerged among legal scholars or lower courts as to the proper yardstick for courts to use to gauge availability. As one commentator has stated, "Measuring availability is the key issue in performing a disparity analysis. Despite substantial efforts made by consultants thus far, they have achieved no consensus about this measurement."[117]

Importantly, the probative force of statistical disparity studies depends upon how the particular studies measure the number of firms available to compete for the particular locality's contracts. The construction industry has many markets, specialties, and qualifications, with firms varying in size, capacity, and area of work. For example, firms that build hospitals or jails are different from companies that lay

See also Contractors Association, 6 F.3d at 1005 ("Disparity indices are highly probative evidence of discrimination because they ensure that the 'relevant statistical pool' of minority contractors is being considered.").

110. *See Croson*, 488 U.S. at 509.

111. *See id.* at 501; *see also* Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 921 (11th Cir. 1997).

112. *See Croson*, 488 U.S. at 509.

113. *See id.*

114. *See* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After* Croson, 21 HARV. J.L. & PUB. POL'Y 793, 800 (1998).

115. *See id.* at 832.

116. *See id.* at 800.

117. *Id.* at 833.

asphalt and install plumbing. In other words, regarding the availability analysis, proper comparisons of firms must be made, in that availability studies should compare like firms to one another, with regards to qualifications, as well as size and capacity.[118]

One of the earlier cases that sought to answer the availability question was *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County.*[119] There, the district court concluded that when a jurisdiction relies upon statistical disparities to defend its MBE program and where special qualifications are a consideration regarding the particular job at issue, the relevant statistical pool must include only those minority firms qualified to provide the requested services.[120]

In defending its Black Business Enterprise ("BBE") program, Dade County relied upon a six-volume, 850-page disparity study, based on 1982 census data, which compared the proportion of black-owned construction firms in three standard industry classification ("SIC") codes to majority-owned firms, with regards to the proportion of overall revenues they received.[121] The case was eventually settled after a three day trial.[122]

Dade County's program was later expanded to assist Hispanic and female-owned businesses.[123] To justify this expansion, Dade County conducted a separate disparity study, which included a regression analysis to control for firm size.[124] In a 1994 legal challenge to the expanded program, the district court concluded that the county's prime contracting analysis did not create a strong basis in evidence to justify the Minority and Women Business Enterprises ("MWBE")[125] Program.[126] The court stated:

> Every expert economist who testified in this case stated unequivocally that the existence of numerical disparities [does] not lead to the conclusion that discrimination exists. This is because simple disparity indices do not account for the myriad factors that can legitimately result in disparities, such as the availability of MWBEs that are actually qualified to perform the contract requirements,

118. *See id.* at 824.

119. 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997) (describing the history of various challenges to the Dade County Black Business Program).

120. *See id.* at 1555.

121. *See* La Noue, *supra* note 114 at 821.

122. *See id.*

123. *See id.*

124. *See id.*

125. "MWBE" will be used interchangeably with "M/WBE," "MFBE," and "M/FBE."

126. *See id.* at 823.

> [and] the size of [firms], which will impact the dollar value of contracts.[127]

The district court also noted that the county had not collected or released data regarding the number of MWBEs that had been utilized on the county's prime contracts as subcontractors.[128] Thus, the court determined that the county's subcontractor availability analysis was flawed.[129]

In a similar case, *Associated General Contractors of America v. City of Columbus*,[130] the district court found that while the City of Columbus's disparity study calculated availability by using three different sources—bidder lists, vendor lists, and telephone surveys—"[n]one of these measures of availability purported to measure the number of M/FBE's who were qualified and willing to bid as prime contractors on city construction projects."[131] The court also criticized the disparity study's methodology regarding the statistical analysis used to calculate subcontractor participation.[132] The court asserted that by combining prime and subcontractor data, the city was mixing "apples and oranges."[133] According to the court, "A statistical analysis which combines prime and subcontract data prevents a separate analysis of M/FBE participation in subcontracting. This methodology defies logic."[134]

Likewise, in *Contractors Association of Eastern Pennsylvania Inc. v. City of Philadelphia*,[135] the district court criticized the city consultant's reliance on census data to determine the aggregate number of available minority contractors, where the consultant had not determined whether qualified, willing, and able black contractors were excluded from participating in Philadelphia public contracting.[136] According to the court, "Dr. Brimmer simply assured that every black contractor

127. Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1546, 1582 (S.D. Fla. 1996).

128. *See* La Noue, *supra* note 114, at 823.

129. *See id.*

130. 936 F. Supp. 1363 (S.D. Ohio 1996).

131. *Id.* at 1389, *rev'd & vacated on other grounds.*

132. *See id.* at 1386.

133. *See id.*

134. *Id.* at 1391. The court concluded that the census figures presented by the city of Columbus overstated the availability of M/FBEs, and improperly combined prime and subcontracting data. In addition, the court also found that the study did not provide convincing evidence of discrimination against M/FBEs in city construction. *See id.*

135. 893 F. Supp. 419 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996).

136. *See id.* at 432.

who was available was equally qualified, willing, and able to perform City public works contracts."[137]

Specifically, the court noted that by simply relying on census data, which only detailed the number of black-owned construction firms in the Philadelphia Standard Metropolitan Statistical Area, the consultant had failed to take bidding activity or prequalification information into consideration.[138] Such information, the court asserted, would have allowed the city to determine which black-owned firms were actually qualified to perform public works projects.[139] "Without measuring the number of contractors actually engaged by the City to perform particular services, it is impossible to determine whether black firms were excluded from performing these services."[140]

The district court accepted the testimony of the plaintiff's expert witness, who had criticized the methodology of the city's expert, Dr. Andrew Brimmer.[141] Specifically, plaintiff's expert criticized Dr. Brimmer's methodology for the following reasons (among others): 1) it relied heavily on census data, without considering true availability; 2) it relied on the city's figures regarding availability without testing these figures; 3) it assumed that all MBEs who were available were also qualified to perform certain jobs; and 4) it never made any independent comparison of the number of black to non-black construction firms in the Philadelphia area who where qualified, willing, and able to perform city contracts.[142]

The court also noted that the plaintiff's expert had compared Dr. Brimmer's disparity study to other studies that Brimmer had performed and had concluded that the Philadelphia study was far less comprehensive than those other studies and was based on evidence that Dr. Brimmer had rejected previously as statistically insignificant.[143]

137. *Id.*

138. *See id.* at 433.

139. *See id.*

140. *Id.* The district court concluded that Brimmer's disparity study was unreliable since it contained many "serious methodological and scientific flaws." *Id.*

141. *See id.* at 432.

142. *See id.* at 431–32. The plaintiff's expert witness was Dr. George R. La Noue. *See id.* at 431.

143. *See id.* at 432. Specifically, Dr. Brimmer had based his conclusion regarding private sector racial discrimination on survey answers provided by non-MBE contractors, which had a return rate of 0.32 percent. This rate was far below the fifteen percent return rate that Dr. Brimmer had rejected as "statistically insignificant" when he had conducted a similar disparity study for Dade County. *See id.*

Contractors Association was later appealed to the Third Circuit. While the appeals court affirmed the district court's holding, the court of appeals differed with the district court's conclusions and assessment of some of the evidence regarding availability and qualifications of minority contractors. The court determined that, while the district court was correct in concluding that a statistical assessment should focus on the minority population capable of performing the work, "[t]he issue of qualifications can be approached at different levels of specificity and . . . some consideration of the practicality of various approaches is required."[144] The court continued, "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[145]

The court further pointed out that some of the district court's criticism, regarding the city's statistics on the willingness of firms to participate in contracting, was problematic.[146] The court stated, "In the absence of some reason to believe otherwise, one can normally assume that participants in a market with the ability to undertake gainful work will be 'willing' to undertake it."[147] Additionally, the court noted, other factors might account for a firm's unwillingness to seek work, such as a firm's having encountered discrimination in a particular market in the past.[148]

In reviewing the district court's ultimate conclusion that the City of Philadelphia had not demonstrated a strong basis in evidence that discrimination existed in the prime contract market, the court of appeals stated that "[t]he record provide[d] substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979-1981 period."[149] Defendant's evidence of disparity in the awarding of prime contracts was represented by a 22.5 on the disparity index, as assessed by the city's expert.[150] The city's expert found that this disparity was sufficiently attributable to discrimination against black contractors,

144. Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 603 (3d Cir. 1996).
145. *Id.*
146. *See id.*
147. *Id.*
148. *See id.*
149. *Id.* at 602.
150. *Id. See supra* note 109 for discussion of the meaning of disparity indices and how they are calculated. A disparity ratio compares the percentage of contract dollars awarded to MFBEs to the percentage of available MFBEs in the relevant market. The lower the ratio, the greater the disparity. The use of disparity indices to examine the utilization of minority firms has been used by a number of federal courts. *See, e.g.*, Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 913 (11th Cir. 1997).

and that it, therefore, justified the city's remedial program.[151] The court of appeals noted that "[t]here are circumstances in which a disparity index of 22.5 can constitute a strong basis in evidence for inferring the existence of discrimination."[152] The court continued, "Whether the record provides a strong basis in evidence for an inference of discrimination in the prime contract market is a close call."[153]

It was a close call the court declined to make. Instead, the court, affirming the lower court's holding, reasoned that, even assuming that the record presented an adequately firm basis from which an inference of discrimination could be created, the program was not narrowly tailored.[154] The primary purpose of the city's program was to provide a market for black subcontractors, within which they could work on prime contracts awarded by the city.[155] However, the city's evidence of discrimination against black subcontractors was insufficient to support a program that was specifically designed to serve this purpose.[156] In fact, the city's expert presented no evidence to the district court regarding black participation in subcontracting.[157] The court of appeals noted that "strict scrutiny review requires [an examination of] the 'fit' between the identified discrimination and the remedy chosen" by the involved jurisdiction to address this discrimination.[158] Since Philadelphia's program focused exclusively on the subcontracting market, the court of appeals concluded that it was not narrowly tailored to address discrimination in the prime contracting market.[159]

As the methods used by different courts and jurisdictions in calculating availability have varied from case to case, courts have suggested that a separate analysis regarding prime contractors and subcontracting is essential.[160] As one commentator has stated, "In calculating availability, one should not conflate two analytically distinct problems."[161]

151. *See Contractors Ass'n*, 91 F.3d at 602.
152. *Id.*
153. *Id.* at 605.
154. *See id.*
155. *Id.* at 606.
156. *See id.* at 607.
157. *See id.* at 606.
158. *See id.* at 605.
159. *See id.*
160. *See, e.g.*, Associated Gen. Contractors of Am. v. City of Columbus, 936 F. Supp. 1363, 1391 (S.D. Ohio 1996).
161. *See* La Noue, *supra* note 114 at 825.

The *Croson* Court did not set forth any specific method for courts to use in determining the contractors and subcontractors that are "available, willing and able" to seek public contracts. Hence, a proper statistical comparison of the firms that are willing and able to perform a particular task to those firms actually engaged by the involved locality is difficult to perform. The Court has indicated that an inference of discriminatory exclusion could arise from evidence of a numerical disparity, demonstrated through comparisons of the types of firms receiving governmental contracts to those being denied such contracts.[162] However, a paradigmatic approach, which provides the proper basis for courts to use in determining whether statistical data on availability is sufficient to demonstrate a discriminatory exclusion of minority firms, has yet to be set forth.

In *Webster v. Fulton County, Georgia,*[163] the Eleventh Circuit court of appeals affirmed the district court's finding that Fulton County had failed to demonstrate a strong basis in evidence of the existence of discrimination against black and minority firms, based on statistical evidence presented in the county's disparity report and its post-disparity report.[164] The disparity report, known as the Brimmer-Marshall Report, consisted of an eight-volume study detailing discrimination against MWBEs based on historical, statistical, and anecdotal evidence.[165] The disparity study showed consistently low disparity and utilization ratios regarding MWBEs.[166] The study found large disparities in public and private contracting opportunities between majority and minority firms.[167] The study noted that minority firms derived much of their revenue from the public sector.[168] The study primarily analyzed black and minority firms, using census data derived from six different SICs, including construction, general contracting, trade contracting, and land development.[169]

After reviewing the study's methodology, the district court found its data and conclusions insufficient to establish a strong basis in evi-

162. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.").

163. 218 F.3d 1267 (11th Cir. 2000).

164. *See id.* at 1267, *aff'g* 51 F. Supp. 2d 1354 (N.D. Ga. 1999).

165. *See* Webster v. Fulton County, Ga., 51 F. Supp. 2d 1354, 1357 (N.D. Ga. 1999).

166. *See id.* at 1368.

167. *See id.*

168. *See id.*

169. *See id.*

dence.[170] The court found "two flaws in the analysis that [were] insurmountable."[171] According to the court, the analysis used in the Brimmer-Marshall study proceeded on the improper premise that a statistical showing of underutilization of minorities in the marketplace as a whole amounted to sufficient proof of discrimination, justifying racial preference by the local government involved.[172] The court found the assumption contrary to *Croson*'s mandate, which disavowed any reliance by a jurisdiction on societal discrimination in the marketplace.[173] "If a statistical showing of underutilization of minorities in the marketplace as a whole is sufficient proof of discrimination to justify a program of racial preferences, such a showing as to the United States as a whole would justify racial preferences by every governing entity in the United States."[174] The court further stated that "statistical evidence of underutilization of minorities in the general Atlanta marketplace alone does not show discrimination by Fulton County according to *Croson*."[175]

The district court's focus in that case was on uncovering a showing of discrimination that had been carried out by the government itself, contrary to Justice O'Connor's plurality opinion in *Croson*, where she rejected the need for such a showing.[176] The court also found that the Brimmer-Marshall study contained no statistical evidence regarding the utilization of minority subcontractors by prime contractors doing business with Fulton County.[177] This failure, the court found, resulted in the county's inability to show that its spending practices were exacerbating a pattern of discrimination in the private sector, as required by *Croson*.[178] The court noted that the county could rely on a showing of discrimination in the private sector if it provided a link between the private sector discrimination and the county's contracting policies.[179] The court also disagreed with the County's definition of discrimination in the private sector "as meaning any governmental contracting in a marketplace where there is dis-

170. *See id.*
171. *Id.*
172. *See id.*
173. *See id.* at 1369.
174. *Id.*
175. *Id.*
176. *See id.* at 1369–70.
177. *See id.* at 1369.
178. *See id.*
179. *See id.*

crimination."[180] The court maintained that government contracts with a firm in a private marketplace where discrimination exists is insufficient to establish that the government itself discriminates. In *Webster*, the county had not provided any linkage between its program and private sector discrimination.[181]

The district court identified the second flaw in the county's disparity study as a lack of "statistical analysis of other factors that may affect minority business enterprise availability and utilization."[182] Specifically, the study did not account for race-neutral factors such as firm size, or the inability of minority firms to obtain financing and bonding.[183] By contrast, as the court pointed out, a regression analysis was used by Dade County in the *Engineering Contractors* case to determine whether the disparities evidenced in that case were due to discrimination.[184] The *Webster* court concluded that, based upon the flaws identified in the county's statistics, the study "fail[ed] to show 'gross statistical disparities' between the proportion of MBEs hired for projects or contracts, and the proportion of minorities willing and able to do the work for Fulton County."[185]

The court also criticized the county's reliance on its so-called "post-enactment evidence," which was set forth in the county's 1994 post-disparity study to justify its 1994 program.[186] The county's expert attempted to use post-enactment evidence regarding Fulton County's utilization of female and minority contractors in relation to their availability, without relying on the unenlightening census approach.[187] In doing so, the expert did not consider any data from firms who had actually bid for contracts with Fulton County.[188] Instead, the expert in that case used bidding data from the city of Atlanta and the Atlanta school system as a basis for determining availability in Fulton County.[189] The court criticized this approach and was unwilling to assume that, because of geographic proximity, there was a close approximation between the availability of M/WBEs in the City of Atlanta and the Atlanta school system and the availability of such firms in Fulton

180. *See id.* (quoting Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1529 (10th Cir. 1994)).
181. *Webster*, 51 F. Supp. 2d at 1369.
182. *Id.*
183. *See id.* at 1370.
184. *See id.*
185. *Id.* (citation omitted).
186. *See id.* at 1373.
187. *See id.*
188. *See id.*
189. *See id.*

County.[190] The court noted that only fifty percent of the minority firms certified by the City of Atlanta were also certified by Fulton County and that part of Fulton County was outside the city limits of Atlanta.[191] Therefore, the court found that the county's expert had improperly analyzed availability in this instance.[192]

The court also discounted the county's reliance on availability measurements that were based on bidding data, stating that reliance on bidders overstates availability because of the "unavailability of minority firms to bid on and obtain large construction contracts."[193] In addition, the court further criticized the post-disparity study because scientific methods were not used to account for disparities that were the result of factors unrelated to discrimination.[194]

The *Webster* case followed the *Engineering Contractors, Contractors Association, Florida,* and *Associated General Contractors* decisions, where there had been no uniform view amongst the courts regarding the proper method to use to measure underutilization and availability of MWBEs. The disparity studies used by the various jurisdictions involved in these cases did not survive close judicial scrutiny in their respective district or appellate courts, regarding the statistical measures of disparity they used to attempt to show that there was a strong basis in evidence of the existence of discriminatory practices.[195]

Although no precise mathematical formula must be used by jurisdictions, some courts have not been receptive to jurisdictions' use of census data regarding their availability or utilization analyses. Courts have gone out of their way to stress that non-discriminatory factors, such as firm size and lack of capital or bonding capacity, may be used to explain the underutilization of minority firms.[196] For example, the

190. *See id.*

191. *See id.*

192. *See id.*

193. *Id.* A regression analysis studies the statistical significance of results and describes the probability that the measured disparity is the result of mere chance. *See id.* Social scientists consider a finding of two standard deviations significant, meaning "there is about a one chance in twenty that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id.* at 1373 (quoting Peightal v. Metro. Dade County, 26 F.3d 1545, 1556 n.16 (11th Cir. 1994)).

194. *See Webster,* 51 F. Supp. 2d at 1375.

195. *See generally* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 893 F. Supp. 419 (E.D. Pa. 1995); *Webster,* 51 F. Supp. 2d at 1354; Eng'g Contractors Ass'n of Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1543 (S.D. Fla. 1996); Associated Gen. Contractors v. City & County of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996).

196. *See, e.g., Associated Gen. Contractors,* 936 F. Supp. at 1409; *Eng'g Contractors,* 943 F. Supp. at 1564. The court noted that numerical disparities do not lead to the conclusion that discrimination exists, and asserted that there are a myriad of factors that can legiti-

court in *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County* pointed out that evidence has indicated that average MBEs tend to be smaller than majority-owned firms, which may be a real/non-discriminatory reason why MBEs are not utilized as much as majority-owned firms.[197]

Criticism of disparity studies persists, despite the fact that many such studies have shown a disparity index sufficient to establish more than a mere inference of discrimination. For example, Philadelphia showed a disparity of 22.5 regarding its utilization of minority firms, as compared to majority-owned firms; the city of San Francisco showed a disparity of 22.4, which it found to be sufficient to raise an inference of discrimination; Fulton County showed a disparity index of under 20 for all black owned-businesses and under 27 for constructors and developers; the Eleventh Circuit found that a disparity index of 10.8 was sufficient to establish a prima facie case of discrimination; and the City of Denver's showing of disparity indices of 9, 14, 19, 43, 48, and 63 "raised an inference of race-based public discrimination on selected works projects."[198]

The use of statistics to prove discrimination is complex and involves the use of divergent approaches. Despite this complexity, courts too often substitute their own judgment for those of the legislative bodies involved in particular cases. Courts have been overly critical of the census approach, where it has been used to identify the market share of contract dollars going to minority firms or to assess these firms' availability. Legislative fact-finding is far different from judicial fact-finding in discrimination cases, yet courts are imposing higher burdens of proof, as compared to the burden placed on Congress, on jurisdictions that are implementing race-based programs. These courts have insisted that jurisdictions offer rigid statistical proof of disparities regarding the jurisdictions' utilization of MBEs, as compared to majority-owned firms. Congress, however, does not need to make

mately explain disparities. *See Eng'g Contractors*, 943 F. Supp. at 1564. These include factors such as the availability of MWBEs that are actually qualified to perform a particular contract's requirements, firm size, which will impact the dollar value of the contracts that can be successfully bid for, and the capacity of firms able to handle multiple contracts at the same time. *See id.*

197. *See Eng'g Contractors*, 943 F. Supp. at 1563.

198. *See* Steven K. DiLiberto, *Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry*, 42 VILL. L. REV. 2039, 2082 (1997). *See* discussion, *supra* note 109, for a description of disparity ratios. The closer the number is to zero (on a scale of 0-100), the greater the likelihood that a statistical inference of discrimination can be made.

such specific findings of discrimination—it is only expected to satisfy a "strong basis in evidence" standard.

E. Anecdotal Evidence

In *Croson*, the Court noted that there was "no direct evidence of race discrimination on the part of the city [of Richmond] in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[199] However, a majority of the Court implicitly endorsed jurisdictions' use of personal accounts of discrimination to support their programs.[200]

Personal accounts of actual discrimination or the individual effects of discriminatory practices may complement a jurisdiction's empirical evidence. As the Supreme Court has stated in the Title VII context, anecdotal evidence may bring "cold numbers convincingly to life."[201]

Earlier post-*Croson* cases endorsed the concept of using anecdotal evidence of discrimination to supplement statistical proof. In *Associated General Contractors of California v. Coalition for Economic Equity*,[202] the Ninth Circuit found that the record in that case documented a "vast number of individual accounts of discrimination, which [brought] 'the cold numbers convincingly to life.'"[203] The court opined that San Francisco's findings were substantially more specific than those statistics that had been found inadequate in earlier cases and that the city's numbers were "clearly based upon dozens of specific instances of discrimination."[204] The city's anecdotal evidence included "numerous reports of MBEs being denied contracts despite being the low bidder, [qualified] MBEs being told they were not qualified, . . . MBEs being refused work even after they were awarded the contracts as the low bidder, and MBEs being harassed by City personnel to discourage them from bidding on city contracts."[205] In addition, on appeal, the city defendant had argued that "racial discrimination [was] still prevalent within the San Francsico construc-

199. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 480 (1989).

200. *See id.* at 509.

201. Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977)).

202. 950 F.2d 1401 (9th Cir. 1991).

203. *Id.* at 1415 (citation omitted).

204. *Id.* at 1416.

205. *Id.* at 1415.

tion industry."[206] The court concluded that such a "combination of convincing anecdotal and statistical evidence [was] potent," and found that the city had established a strong basis in evidence of discrimination.[207]

Similarly, in *Cone Corporation v. Hillsborough County*,[208] the Eleventh Circuit found that testimony from MBEs, who filed complaints to the county about prime contractors' discriminatory practices, supplemented the county's statistical evidence of discrimination.[209] The court stated, "Testimony regarding these complaints, combined with . . . gross statistical disparities . . . provides more than enough evidence on the question of prior discrimination."[210] *Cone* was one of the other earlier cases in which a court, applying *Croson*, reached a holding that sustained the government defendant's showing of discrimination. Other courts have also found anecdotal evidence to be as equally appropriate as empirical evidence to support a showing of the existence of discrimination.[211] However, neither empirical evidence nor select anecdotal evidence alone provides a strong enough basis in evidence for a jurisdiction to be able to demonstrate public or private discrimination to the extent the *Croson* standard requires.[212]

In *O'Donnell Construction Company v. District of Columbia*,[213] the court of appeals reversed the lower court's decision to deny plaintiff's request for a preliminary injunction, finding the anecdotal evidence offered by the city inadequately supplemented weak statistical evidence.[214] The court asserted that anecdotal evidence was only useful when it was offered to supplement an already strong statistical showing of disparity.[215]

In a similar case, *Webster v. Fulton County*, defendant county introduced a "substantial amount of anecdotal evidence in connection with

206. *Id.*

207. *Id.* (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991)).

208. 908 F.2d 908 (11th Cir. 1990).

209. *See id.* at 916.

210. *Id.* In reviewing the lower court's granting of summary judgment, the court of appeals found the anecdotal evidence to be "potent." *See id.*

211. However, courts have found that anecdotal evidence must be strong for it to support a showing of the existence of discrimination. *See* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1003 (3d Cir. 1993). "Although anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here." *Id.*

212. *See* Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1520 (10th Cir. 1994).

213. 963 F.2d 420 (D.C. Cir. 1992).

214. *See id.* at 427.

215. *See id.*

the Brimmer-Marshall Study and the 1994 Post-Disparity Study."[216] Part of this anecdotal evidence consisted of confidential, in-depth interviews of seventy-six individuals regarding the ongoing effects of past and present race and gender discrimination.[217]

According to the district court, the interviewees had clearly demonstrated that unfavorable discriminatory practices existed in the county, especially with respect to private sector discrimination, within which "unfavorable experiences of racial, ethnic and gender discrimination in several areas" were evinced.[218] However, after reviewing this testimonial evidence, the district court asserted, "[T]he anecdotal evidence alone is insufficient to provide a strong basis in evidence to justify the racial and ethnic preferences or sufficient probative evidence to justify the gender preferences."[219]

In *Associated General Contractors*, yet another court was highly critical of the use of anecdotal evidence to support an MFBE program. In that case, the district court elevated the standard for weighing the objectivity of the anecdotal method to that which, in the court's words, "meet[s the] minimum standards of a reasonably competent forensic investigation."[220] The court condemned the methods the city had used to gather anecdotal evidence of discrimination because the methods had not focused on important details, such as the time and place of the alleged discriminatory incidents or events.[221] Noting that not every business disappointment of an M/FBE was an example of discrimination, the court stressed that more than proof of such disappointment was required to create an inference of discrimination.[222] The court stated:

216. Webster v. Fulton County, Ga., 51 F. Supp. 2d 1354, 1378 (N.D. Ga. 1999).

217. *Id.* The district court noted that "[a]necdotal evidence may be used to establish discrimination, especially if buttressed by relevant statistical evidence." *Id.* at 1363.

218. *Id.* at 1378. The interviewees reported these unfavorable experiences in areas such as "(1) discrimination in bonding; (2) discrimination in financing; (3) discrimination in employment opportunities; (4) double standards in performance and qualifications; (5) limited access to private sector markets; and (6) stereotypical attitudes on the part of customers and buyers." *Id.*

219. *Id.* at 1379. The district court noted that only two individuals had testified to having experienced discrimination by Fulton County. *See id.* It further pointed out that "[o]ne of these was a Native-American designer who complained bitterly that Fulton County use[d] the MFBE Program to benefit only African-Americans." *Id.* The court concluded that the anecdotal evidence was "insufficient to support racial and ethnic preferences subject to strict scrutiny." *Id.*

220. Associated Gen. Contractors v. City & County of Columbus, 936 F. Supp. 1363, 1425 (S.D. Ohio 1996), *rev'd on other grounds*, 172 F.3d 411 (6th Cir. 1999).

221. *Associated Gen. Contractors*, 936 F. Supp. at 1426–27.

222. *See id.* at 1439.

> The fact that a certain number of M/FBEs were denied loans or were denied bonding or had a bid rejected is not probative of discrimination. An inference of discrimination could be drawn only if similarly situated non-M/FBEs were treated more favorably or if the disappointed M/FBE was in fact the lowest bidder. The fact that a disappointed M/FBE may think, feel or believe that race or gender was a factor is not enough.[223]

The court maintained that the standards regarding evidence of discrimination against M/FBEs by banking and bonding companies required information to be presented regarding the treatment of all firms applying for loans or bonds.[224] In other words, the fact that a certain number of M/FBEs were denied loans or were denied bonding was not, according to the court, probative of discrimination.[225] An inference of discrimination could arise only if non-M/FBEs were treated favorably, as compared to M/FBEs.[226] The court concluded that, regarding the causes of disparity, the city's investigation as set forth through anecdotal evidence improperly emphasized perceptions of discrimination rather than actual discrimination.[227]

Other courts have suggested that interview or response biases are important factors to be taken into consideration by fact-finders when weighing the reliability of anecdotal evidence. Along these lines, courts have been particularly hostile towards the role anti-discrimination advocates have played in gathering anecdotal evidence and in conducting legislative hearings.[228] However, it appears that lower courts, such as the district court in *Associated General Contractors*, have relied on a showing of actual proof of discrimination, rather than a strong basis in evidence that such discrimination exists.[229] The courts

223. *Id.* at 1427. The court was unduly critical of the county's method for collecting anecdotal evidence, imposing requirements as though the county were conducting a forensic investigation, rather than documenting alleged victims' accounts of discrimination. However, the duty upon jurisdictions is to establish the factual basis from which the existence of discrimination may be inferred, not to prove or verify the existence of discrimination.

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *See* La Noue, *supra* note 9, at 33. The district court in *Associated General Contractors* criticized the Minority Business Enterprise and Legal Defense and Educational Fund for its gathering of anecdotal evidence, suggesting that this was like putting the National Rifle Association in charge of evaluating gun-control. *See id.* However, some believe that this hostility ignores the role that advocacy groups have played historically, such as the important role the NAACP has played in documenting the existence of discrimination.

229. *See id.* For example, the district court in *Associated General Contractors* asserted that the investigation should focus on matters that are germane to the issue of discrimination and should be informed by judicially recognized methods of proving discrimination. *See*

are engaging in a *de novo* review of legislative fact-finding, basing their decisions on their own inferences, rather than engaging in a determination of whether or not a strong basis in evidence of the existence of discrimination had been presented at the trial level.

F. Post-Enactment Evidence

Another muddled area regarding the establishment of a factual predicate of discrimination is the legitimacy of defendant jurisdictions' use of post-enactment evidence to establish the necessary showing of discrimination. This type of evidence consists of statistics gathered subsequent to jurisdictions' adoption of race-based programs for MBEs. In *Croson*, the Court stated that state or local governments, when they "possess evidence that their own spending practices are exacerbating a pattern of discrimination[,] . . . must identify that discrimination . . . with some specificity before they may use race-conscious relief."[230] The Court did not require that all relevant evidence of such discrimination be gathered prior to a program's adoption. Many courts that have been presented with the question of the admissibility of post-enactment evidence have held it to be admissible.[231]

As the Eleventh Circuit stated in *Ensley Branch, NAACP v. Seibels*:[232]

> Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary, formal findings of discrimination need neither precede nor accompany the adoption of affirmative action.[233]

Associated Gen. Contractors v. City & County of Columbus, 936 F. Supp. 1363, 1426 (S.D. Ohio 1996).

230. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989).

231. *See, e.g.*, Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1003–04 (3d Cir. 1993); Coral Constr. Co. v. King County, 941 F.2d 910, 919–20 (9th Cir. 1991). *But see, e.g., Associated General Contractors*, where the court stated that it would "hold postenactment evidence inadmissible," but would look at all the evidence which the city offered to support its legislation. 936 F. Supp. at 1383. In criticizing post-enactment evidence, the court stated, "The admission of postenactment evidence poses a risk of . . . undesirable consequences. It may encourage a government which has a strong political motivation to enact race- and gender-based preferences to proceed without an adequate factual basis, gambling that the legislation will not be challenged in court." *Id. See also* Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1328–29 (Fed. Cir. 2001).

232. 31 F.3d 1548 (11th Cir. 1994).

233. *Id.* at 1565.

In *Concrete Works*, the Court rejected plaintiff's argument that defendant's post-enactment evidence should be inadmissible: "Indeed, post-enactment evidence, if carefully scrutinized for its accuracy, will often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program."[234]

Recently, however, lower courts have rejected the use of post-enactment evidence.[235] In these cases, plaintiffs suing jurisdictions using MBE programs have insisted that municipalities are required to have a strong basis in evidence of discrimination *before* implementing a race-based program. These plaintiffs have interpreted *Croson* to require, at least, that the jurisdiction's evidence show that discrimination existed *prior* to the adoption of their programs.

In *West Tennessee Chapter of Associated Builders and Contractors, Inc. v. Board of Education*,[236] the district court acknowledged that the Ninth and Tenth Circuits had specifically endorsed the view that a strong basis in evidence may be established via post-enactment evidence.[237] However, the court ultimately concluded that, ordinarily, the use of post-enactment evidence to show a compelling intent was contrary to the Supreme Court precedent established in *Wygant*, *Croson*, and *Shaw*, and that it was therefore inadmissible in this case.[238]

The court reasoned that requiring pre-enactment evidence would ensure a proper screening of the programs, under which the courts would be better able to determine whether the actual purpose of the particular MBE program was remedial or not.[239] According to the court, under strict scrutiny, the fact-finder is concerned not just with "whether the factual predicate exists justifying the defendants' actions, but also whether the defendants' actual purpose was remedial."[240] Here, the district court interpreted the language in *Croson* as requiring the defendant governmental entity to develop the necessary

234. *Concrete Works*, 36 F.3d at 1521.

235. *See, e.g.*, Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 738 (6th Cir. 2000); *see also* Associated Util. Contractors of Md., Inc. v. Mayor & City Council of Balt., 83 F. Supp. 2d 613, 620–621, 621 n.6 (D. Md. 2000) (disagreeing with the decisions of several circuit courts that had found post-enactment evidence admissible, based on that it believed that the Supreme Court had "provide[d] controlling authority on the role of post enactment evidence in the 'strong basis in evidence' inquiry," and that these circuit courts had not yielded to this authority).

236. 64 F. Supp. 2d 714 (W.D. Tenn. 1999).

237. *See id.* at 719.

238. *See id.*

239. *See id.*

240. *Id.*

evidence of discrimination *before* enacting a plan.[241] Since the *Croson* Court had characterized racial classification as a "highly suspect tool" and had explained that the purpose of strict scrutiny was to smoke out "illegitimate uses of race,"[242] it made sense to the court to examine defendant's pre-enactment evidence, before examining other evidence, to determine whether the MBE program at issue was implemented based on proper motives.[243] The court stated:

> When evidence of remedial need is not developed until after a racial preference plan is enacted, that evidence provides no insight into the motive of the legislative or administrative body. Thus, while race-based programs may be justified to remedy past discrimination, the governmental entity seeking to implement such a plan "must identify that discrimination, public or private, with some specificity *before* they may use race-conscious relief."[244]

The court further noted that the use of post-enactment evidence may encourage governments with strong racial political motivations to enact programs without a factual basis to do so.[245]

In *Associated Utility Contractors of Maryland v. Mayor & City Council of Baltimore*, the district court held that the City of Baltimore had to limit itself to using pre-enactment evidence to defend its MBE program.[246] There, the court found that there was no pre-enactment evidence to support the city's adoption of subcontracting set-aside goals of twenty percent for MBEs and three percent for WBEs.[247] Accordingly, it held that the twenty percent goal was not supported by a strong basis in evidence, and that the three percent goal was not substantially related to the asserted important governmental interest of remedying gender discrimination.[248]

In reaching its holding, the court concluded that the Supreme Court's decision in *Shaw* had reaffirmed the Court's plurality opinion in *Wygant*, where the Court had determined that pre-enactment evidence must provide a "strong basis in evidence" that a race-based remedy is necessary to solve the jurisdiction's existing disparity

241. *See id.* at 720.

242. *Id.* at 721.

243. *See id.* at 717.

244. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)).

245. *See West Tennessee*, 64 F. Supp. 2d at 720.

246. *See* Associated Util. Contractors of Md., Inc. v. Mayor & City Council of Balt., 83 F. Supp. 2d 613, 621 (D. Md. 2000).

247. *See id.*

248. *See id.* at 622. The court noted that the Fourth Circuit had not ruled on whether affirmative action measures must be justified by a strong basis in pre-enactment evidence. *See id.* at 622 n.6.

problems.[249] In *Associated Utility Contractors*, the court said that is was "undisputed . . . that the City considered *no evidence in 1999* before promulgating the construction subcontracting set-aside of 20% for MBEs and 3% for WBEs."[250]

The legitimacy of post-enactment evidence consisting of anecdotal circumstantial evidence was addressed by the district court in *Builders Association of Greater Chicago v. Cook County*.[251] The district court noted that while *Croson* emphasized the need for a predicate study justifying the creation of an MBE program, it did not have occasion to address the question of the admissibility of circumstantial evidence offered in the absence of a predicate study.[252]

Therein lies the issue of the significance of post-enactment evidence in general. In the absence of race-based or gender-based initiatives, enacted to ensure the inclusion of MWBEs in the construction industry, will there be sufficient utilization of minority and female firms in the public or private sector, with respect to their availability? Can proof of the non- or underutilization of MWBEs, combined with evidence of a jurisdiction's failure to fix or to utilize numerical goals, be considered probative circumstantial evidence of discrimination?

In *Builders Association*, Cook County defended its M/WBE program by using anecdotal and circumstantial evidence of discrimination in the private marketplace. The court concluded that defendant's evidence did not show a pattern of majority contractors' refusing to hire M/WBE subcontractors because of race, gender, or ethnicity.[253] Defendant attempted to establish a "strong basis in evidence" by showing the existence of a pattern of discrimination in the private marketplace of the subcontracting construction industry, based upon anecdotal testimony that consisted mainly of post-enactment evidence.[254] The county chose not to rely on its earlier disparity study or on pre-enactment evidence to support its MBE program.[255] Although there was some testimony that supported the county's claim that mi-

249. *See id.* at 620–21.

250. *Id.* at 621.

251. 123 F. Supp. 2d 1087, 1093 (N.D. Ill. 2000).

252. *See id.*

253. *See id.* at 1116.

254. *See id.* at 1093.

255. *See id.* Cook County chose not to rely on its 1993 Disparity Study, showing underutilization, and instead relied on post-enactment evidence. *See id.* No city or county, up to this point, had successfully defended its program without using a disparity study, yet most courts had invalidated most studies, as well. The county presented an employment discrimination model of proof in hopes of establishing a prima facie case of discrimination by majority contractors in the private sector. *See id.*

nority subcontractors in the area had suffered from discrimination in the past, such testimony was primarily introduced to buttress the county's evidence regarding *present* discriminatory conduct.[256]

Interestingly, plaintiff Builders Association had moved for summary judgment on the basis that defendant had presented no evidence of race or gender discrimination that existed before the enactment of the ordinance at issue.[257] Defendant county conceded to plaintiff's claim that there was no specific evidence, regarding pre-enactment discrimination, to support its ordinance.[258] Instead, the county relied on the theory that post-enactment evidence would show that but for the existence of the race-based remedy, there would be race and gender discrimination by prime contractors in their selection of subcontractors for county work.[259]

In addition, the county believed that anecdotal evidence would show that prime contractors, who had hired minority subcontractors for public work, would not hire minority subcontractors for private work.[260] The district court denied plaintiff's motion for summary judgment and held that defendant would be permitted to submit evidence to support its argument that prime contractors, involved on public contracts, refused to hire minority and female firms for private jobs.[261] The district court accepted defendant's theory that a strong basis in evidence of discrimination could be made out by showing that discrimination was carried out not by the county itself but by general contractors who were discriminating in the private sector.[262] However, according to the court, defendant's actual evidence did not evince what the county had set out to prove.[263] The court stated that defendant had made no effort to show discriminatory hiring in the private sector, but rather, it "attempted to show that M/WBEs were not *solicited for bids* in the private sector."[264] The theory was that because MBEs were not approached to be considered for jobs, they could not be considered, let alone hired, for private jobs.[265]

256. *See id.* at 1112.
257. *See id.* at 1093.
258. *See id.*
259. *See id.*
260. *Id.* at 1094.
261. *See id.*
262. *See id.* at 1112.
263. *See id.*
264. *Id.*
265. *See id.*

Defendant's theory was that proof of failure to solicit was proof of intentional discrimination.[266] The district court acknowledged the difficulties of showing discrimination under this theory.[267] According to the court, in the private marketplace, a discriminatory refusal to hire on the basis of race would have to be proven on a contract-specific basis.[268] In most instances, however, it would be almost impossible to prove discrimination based on a particular contractual situation.[269] As the court stated:

> The reason defendants' proof is cast in terms of failure to solicit rather than failure to hire is that, with the evidence defendants have, it would be impossible to prove the latter proposition. As defendants acknowledge, a discriminatory refusal to hire would have to be proved on a contract-specific basis. One would have to know which subcontractors were willing and able to do the particular job, which among them was the best qualified, and which had the lowest price. Then one would have to know what subcontractor was hired by the general contractor. If it was a non-M/WBE, and one or more qualified M/WBEs had submitted better bids, an inference of invidious discrimination would be justified unless the contractor could offer a persuasive non-discriminatory reason for choosing the non-M/WBE.[270]

The court further opined that an examination into whether a general contractor had been discriminating on a particular project would entail an inquiry into the prime contractors' treatment of minority and female firms in each of the different trades that may be involved in a single project.[271] In other words, in such a query, a fairer picture of the prime contractor's behavior on the entire contract would have to be taken into consideration.[272]

The court in *Builders Association* seemed to enlarge the government's burden by requiring them to show that a prime contractor's allegedly discriminatory conduct spanned across different trades, instead of only requiring them to offer evidence regarding how the contractor treated the M/WBE in question.[273] Still, it is not necessary for defendant jurisdictions to demonstrate that contractors have treated all MWBEs differently from majority-owned firms to establish that discriminatory conduct has taken place. The district court acknowledged

266. *See id.*
267. *See id.*
268. *See id.*
269. *See id.*
270. *Id.*
271. *See id.*
272. *See id.*
273. *See id.* at 1112–13.

the difficulties in proving discriminatory hiring: "It is understandable . . . that defendants attempted to find a surrogate for proof of discriminatory failure to hire. Discriminatory failure to solicit, if proved, might qualify."[274]

The court offered a two-part inquiry, to be used when evidence of contractors' failure to solicit firms might be sufficient proof of discrimination.[275] First, the court should consider whether there was proof of a systemic failure to solicit; and secondly, it should determine whether such failure, if found, was the result of racial, gender, or ethnic discrimination.[276] Defendant's evidence in *Builders Association* consisted of testimony from minority and female contractors regarding their having not been solicited to submit bids on private work, although they had requested such work.[277] Other accounts related that certain MBE trade organizations had never received information concerning their bidding on private work.[278] Finally, the city's witnesses offered testimony which revealed that general contractors, for the most part, had made no effort to solicit M/WBEs.[279]

The court concluded that the evidence offered by defendant was sufficient to establish a "systemic lack of any effort on the part of non-M/WBE general contractors to solicit bids specifically from M/WBEs for subcontract work."[280] However, whether this conclusion resulted in proof of a systemic denial of opportunity was another matter.[281] The court noted that not receiving an invitation to bid was not the same as being denied the opportunity to bid.[282] The court identified various ways in which subcontractors who were interested in bidding could find out about contracts without being invited to bid.[283] Moreover, the court noted that the uncontradicted evidence indicated that contractors accepted unsolicited bids.[284] Based upon these findings, the court decided that no showing of a systematic denial of opportunity to bid had been made by defendant.[285]

274. *Id.* at 1113.
275. *See id.*
276. *See id.*
277. *See id.*
278. *See id.*
279. *See id.*
280. *Id.*
281. *See id.*
282. *See id.*
283. *See id.*
284. *See id.*
285. *See id.*

Even assuming that there had been a showing of contractors' systematic failure to solicit, the court had to determine whether the denial of opportunity to bid had been based on race.[286] The court examined the anecdotal evidence offered by intervenor witnesses regarding discriminatory statements that had been made by supervisory employees against minority and female contractors.[287] Noting that this type of evidence might be sufficient to prove discriminatory motive against single employers, the court asserted that more evidence was necessary to show systematic discrimination against an entire industry.[288] The court stated:

> Defendants' burden is not to show that one, or even a few employers made biased decisions, but to show that the bias pervaded the industry to the extent that it can fairly be called systemic. While the anecdotal evidence may be sufficient to make a case against the small number of general contractors the witnesses testified about, it stops there.[289]

This assertion obviously begs several questions. How much anecdotal evidence is sufficient to establish a strong basis in evidence of discrimination in a particular geographic market? Would an inference of discriminatory denial of opportunity to bid on private work arise from testimony regarding overt discriminatory statements made by supervisory employers? How "pervasive" is alleged overt discrimination in a particular industry if a certain number of firms refuse to solicit or hire MWBE? Finally, how can a jurisdiction establish proof of systemic discrimination in public or private sector contracting and what role does anecdotal evidence play in a jurisdiction's attempt to establish this proof?

In *Cone*, an early MBE case, the Court of Appeals for the Eleventh Circuit found that the county's program was justifiable, where the county had offered anecdotal evidence in order to meet its burden of proof.[290] Subsequently, the court reversed the lower court's decision to grant plaintiff summary judgment.[291]

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286. *See id.*

287. *See id.* at 1114.

288. *See id.*

289. *Id.*

290. *See* Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990).

291. *See id.* at 916. The court held that the testimony regarding the complaints, combined with evidence of gross statistical disparities, provided enough evidence on the question of prior discrimination and the need for a race-based program to avert summary judgment. *See id.* Evidence showed that some contractors simply would not accept bids from MBE firms, and if MBEs did bid, these contractors would shop the bids around so that a non-minority firm would have the chance to under-bid the MBE. *See id.* Additionally,

Outside of MBE contracting in public and in the private marketplace, the use of anecdotal evidence to establish discriminatory motive has been deemed a proper method for jurisdictions to utilize. In employment discrimination cases, courts have readily found that anecdotal evidence may be utilized by jurisdictions to prove the existence of discriminatory hiring practices. Similarly, in *EEOC v. Sears, Roebuck and Company*,[292] the Seventh Circuit Court of Appeals stated, "we do not agree that examples of individual instances of discrimination must be numerous to be meaningful."[293]

The defendant in *Builders Association* attempted to show the existence of discrimination by offering testimony of a number of witnesses who said that while white contractors would hire minority firms on public jobs, minority firms would not be hired or invited to bid on private jobs.[294] There, the court stated that this testimony would only be useful to show discrimination by particular employers, but that it was insufficient to demonstrate discrimination in the private sector.[295] The court refused to infer that systematic discriminatory exclusion had been established, noting that the fact that minority firms "were hired on county jobs might be due to the fact that they were the best qualified MWBEs, not that they were the best qualified bidders, or even the low bidders."[296] The court acknowledged that the evidence suggested that some MWBEs were hired not necessarily because they were the best-qualified firms for the jobs, but to fulfill MWBE requirements.[297] Furthermore, the court stated that there was virtually no evidence offered that would suggest that any general contractor had hired a non-MWBE subcontractor on a private project that was less-qualified or higher-priced than other available MWBE subcontractors.[298] The court further noted that there was no evidence of MWBEs actually bidding on private sector work.[299] Therefore, the court found that Cook County had not proved the existence of private marketplace discrimination.[300]

"non-minority subcontractors and contractors got special prices and discounts from suppliers which were unavailable to MBE purchasers." *Id.*

292. 839 F.2d 302 (7th Cir. 1988).

293. *Id.* at 311–12 (quoting *Teamsters*, 431 U.S. at 339).

294. *See* Builders Ass'n of Greater Chi. v. Cook County, 123 F. Supp. 2d 1087, 1114 (N.D. Ill. 2000).

295. *See id.*

296. *Id.*

297. *See id.*

298. *See id.*

299. *See id.* at 1114–15.

300. *See id.* at 1116.

Accordingly, for a jurisdiction to be able to show systemic discrimination, which resulted in a denial of MBEs' opportunity to bid in the private marketplace, the jurisdiction must not only show that minority firms bidded on jobs for which they were not solicited, but that higher-priced bids, made by white subcontractors who were less qualified than certain MBEs, were accepted.[301] Uncovering and, subsequently, demonstrating this level of proof presents insurmountable problems for jurisdictions attempting to justify their MBE programs.

Part of the evidence presented by defendant county in *Builders Association* consisted of majority contractors' answers to interrogatories that focused on whether the contractors used MWBEs on private sector jobs.[302] Based upon these answers, defendant's expert concluded that, in the absence of an ordinance requiring MWBE utilization by contractors, majority contractors would not use MWBEs on public or private jobs.[303] Additionally, witness testimony from associations of MWBEs indicated a pattern of discriminatory exclusion of minorities from private sector work.[304] On appeal, the Seventh Circuit Court of Appeals affirmed the district court's finding that defendant Cook County had not established a strong basis in evidence and supported the lower court's decision to enjoin enforcement of Cook County's race-based ordinance.[305] Judge Posner, in a very cryptic portion of the opinion, criticized the county's theory upon which it set out to prove that systematic discrimination had taken place in the private sector.[306] He wrote:

> We recur in this hypothetical to one of the most dubious propositions advanced by the County in this case—that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project. The larger the quota im-

301. *See id.* at 1114–15.

302. *See* Builders Ass'n of Greater Chi. v. Cook County, 123 F. Supp. 2d 1087, 1095 (N.D. Ill. 2000).

303. *See id.* Defendant's expert analyzed intervenor witnesses' responses to interrogatories regarding contractors' utilization of MWBEs on non-county and private projects. Interrogatories were sent to 348 contractors. Only ten percent, or thirty-two, of the witnesses responded. Plaintiff claimed that this limited number of answers was insufficient to account for any meaningful significance. *See id.*

304. *See id.* at 1095–1097. To corroborate a pattern of discriminatory denial of opportunity to bid, defendant offered testimony of representatives from various trade associations, including Black Contractors United, the Federation of Women Contractors, the Hispanic-American Construction Industry Association, the Illinois Association of Minority Contractors, and the Association of Asian Construction Enterprises. *See id.* at 1088.

305. Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642, 648 (7th Cir. 2001).

306. *See id.* at 647–48.

> posed on prime contractors on hiring subcontractors for public projects, the smaller will be the percentage of subcontractors hired for private projects even if there is no discrimination by prime contractors, simply because the quota will have drawn minority subcontractors into the public projects and driven majority subcontractors out of those projects and into the private ones.[307]

Posner equates goals with quotas and does not indicate what would happen to minority subcontractors in the private sector in the absence of race-based goals. Presumably, minority availability would increase and, in the absence of discrimination, so would utilization.

G. Burden of Proof and Burden of Production

Lower courts, reviewing the sufficiency of evidence to sustain the constitutionality of state and local M/FBE programs, have seldom found that the existence of a strong basis in evidence of discrimination has warranted race-based remedial action. While *Croson* placed the initial burden of proof on the defendant local jurisdictions to establish a strong basis in evidence,[308] few jurisdictions have been able to satisfy the first prong of the strict scrutiny analysis.

Following *Croson*, lower courts have placed the initial burden of production on the state or local governmental actors, requiring them to demonstrate a strong basis in evidence that race and gender conscious programs were aimed at remedying identified past and/or present discrimination.[309] According to *Croson*, the district court must first make a factual determination as to whether the defendant has established a strong basis in evidence to support the conclusion that a remedial racial or ethnic program was necessary.[310] This does not mean that the government must establish and prove the existence of actual discrimination, but only that it must establish a prima facie case of the existence of discrimination.[311]

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307. *Id.*

308. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 539 (1989).

309. *See* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1006 (3d Cir. 1993).

> [W]here a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. Croson's reference to an 'inference of discriminatory exclusion' based on statistics, as well as its citation to [two] Title VII pattern cases, supports this interpretation.

Id.

310. *See Croson*, 488 U.S. at 539.

311. *See id.*

Notwithstanding the initial burden, i.e., that of production, the ultimate burden of proof is on the party challenging the program.[312] Thus, the plaintiff must persuade the court that the "race-based preference were not intended to serve the identified compelling interest."[313]

In evaluating the strength of this evidentiary showing, courts have not received any clear guidance as to what amounts to a showing of a "strong basis in evidence." In *Builders Association,* for example, the court seemed to impose a requirement upon the defendant city that it prove that non-minority firms, who were less qualified and had higher prices than minority firms, were still selected to perform private sector jobs over minority firms.[314] It would be virtually impossible to examine every private sector negotiation and subcontract in order to determine who was the best-qualified and most willing and able subcontractor to perform a particular job amongst those considered for the job.

Additionally, some courts have striken evidence regarding prejudicial statements made by supervisors, considering such statements to amount only to evidence of individual employees', rather than companies', improper motives. In the day-to-day world of business transactions, how does one uncover the hidden improper discriminatory motives of employers or the discriminatory statements made behind closed doors, which serve as the basis for minority bids being rejected? Many disparity studies have reported the existence of a "good old-boy network" in the bidding community, where women and blacks have been implicitly excluded from the process by majority contractors.[315] How does one prove the exclusionary practices of this informal network within the construction industry? Would whistle blowers ever come forth, admitting racial and gender bias?

The difficulties of proving systemic discrimination in the construction market are complex and involve many variables, yet *Croson* commands that governments meet their burdens of proof with speci-

312. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277–78 (1986) (Powell, J., plurality opinion). The ultimate burden remains on the plaintiff to demonstrate the unconstitutionality of an affirmative action program. *See also* Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1522 (10th Cir. 1994). "An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination."

313. Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996).

314. *See* Builders Ass'n of Greater Chi. v. Cook County, 123 F. Supp. 2d 1087, 1114–15 (N.D. Ill. 2000).

315. *See, e.g.*, Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1168 (10th Cir. 2000) [*Adarand VII*].

ficity.[316] Particularized findings of discrimination are required not only for the purpose of setting the inquiry's boundaries, but are equally important in defining the scope of the remedy.[317]

The Court in *Croson* established that a pattern of discriminatory acts could, if supported by statistical proof, lend support to a local government's determination that broader relief, than that which was solely directed at helping individual victims of discrimination, is justified.[318] However, individual instances of discrimination *alone* are insufficient to justify an MBE program.[319]

Obviously, because of the heterogeneous and elastic nature of the construction industry, which includes various trades, sub-industries and specialties, the qualifications for determining the suitability of a "subcontractor" are not interchangeable with the qualifications for determining the same regarding a typical "employee." Firms that are qualified to perform one particular job may be ill-suited for another job.

However, is there a difference between minority firms, who perform jobs in the public sector, and the same firms who seek to perform the same type of work in the private sector? Aside from the issue of qualifications, there are many other factors, such as firm size, financial capital, bonding capacity, and nepotism, which may affect a contractor's hiring decision on a particular job, blurring the issue of discriminatory treatment.

The framework for allocation of burden of production and for the presentation of proof in cases of employment discrimination appears to be the same for cases of intentional discrimination under section 1981 of 42 U.S.C., which covers racial discrimination in contractual arrangements.[320] A prima facie case regarding individual instances of discriminatory treatment may be difficult to prove in an industry-wide market. This is because the non-solicitation of a subcontracting firm bidding on a particular contract is the exact thing that prevents a court from being able to resolve the second prong of the *McDonnell Douglas* framework, i.e., whether that subcontractor was denied the contract or job.

316. *See Croson*, 488 U.S. at 504.

317. *See id.* at 470.

318. *See id.* at 509.

319. *See id.*

320. *See* Howard v. BP Oil Co., 32 F.3d 520, 524 (11th Cir. 1994) (setting forth that plaintiff, a black applicant for a gasoline dealership, would be required to present evidence on how many blacks applied for dealer positions and were rejected, as well as evidence on the success rates of equally qualified white applicants).

In summary, discriminatory hiring practices that harm minority or female contractors present special problems regarding the issue of proof. In the private marketplace, majority firms rarely, if ever, maintain information by race or ethnicity. Moreover, the difficulty of quantifying the number of contracts and subcontracts being made in a given market, at any given time, compounds the problem. Still, jurisdictions could identify, as in *Cook County*, majority firms that utilize the same minority firms on public contracts as they do on private contracts. In sum, it is difficult for local governments to establish the existence of industry-wide discriminatory practices, such as failure to solicit or to use minority firms, by using anecdotal evidence.

II. *Adarand Constructors, Inc.* and Strict Scrutiny of the Federal Government's MBE Programs

In *Adarand Constructors, Inc. v. Pena* (*Adarand III*), the first *Adarand* case before the Supreme Court, the Court held that strict scrutiny was the proper standard for courts to apply regarding the *federal government's* use of racial classifications.[321] Thus, the Court broadened *Croson*'s mandate by subjecting even the *federal government's* use of racial classifications to the rigors of strict scrutiny. The *Adarand III* decision addressed the question that had been left unanswered in *Croson*—whether any standard of review lesser than strict scrutiny should be applied regarding the *federal government's* use of racial classifications.

At issue in *Adarand III* was a DOT program that allowed for prime contractors to be compensated or awarded financial bonuses if they hired subcontractors who were certified as small businesses controlled by "socially and economically disadvantaged individuals."[322] The program also required that the prime contractors "presume that such [disadvantaged individuals] include[d] minorities or any other individuals found to be disadvantaged by the Small Business Administration [("SBA")]."[323]

The Mountain Gravel & Construction Company had been awarded the prime contract for a highway construction project in Col-

321. *See* Adarand Constructors, Inc. v. Slater, 515 U.S. 200, 227 (1995) [*Adarand III*].

322. *Id.* at 200. The Subcontractor Compensation Clause ("SCC") provided a financial bonus of up to ten percent to a prime contractor for employing a DBE. *See id.* This was used to implement federal statues that sought to meet certain aspirational goals of ten percent DBE participation on federal contracts. *See id.*

323. *Id.*

orado, financed by federal funds.[324] Adarand Constructors, Inc., a Colorado-based highway construction company specializing in guardrail work, submitted the low bid to Mountain Gravel.[325] However, Gonzales Construction Company, which had been certified as a small business owned and controlled by "socially and economically disadvantaged individuals," was awarded the contract.[326] Adarand, which had not been designated as one of the above-mentioned certified disadvantaged small businesses, filed suit.[327]

Adarand contended that the federal government's use of race-conscious presumptions, to determine which businesses were socially and economically disadvantaged, violated the equal protection component of the Fifth Amendment.[328] Specifically, Adarand argued that but for the additional compensation Mountain Gravel obtained from hiring Gonzales, Adarand would have been hired.[329]

The district court applied an intermediate standard of review, upholding the DOT's statutory provision, which defined DBEs and set forth goals for DBE participation in governmental contracting.[330] The court of appeals, also using an intermediate standard of review, upheld the program "because it [was] narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small [DBEs] . . . ."[331] The Supreme Court reversed.[332]

The Supreme Court in *Adarand III* reached a consensus regarding the proper standard of review for courts to use in adjudging the constitutionality of race-based classifications, regardless of the jurisdiction that is using such classifications.[333] The Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[334] "In other words," the Court continued, "such classifications

324. *See id.*

325. *See id.* at 205.

326. *See id.*

327. *See id.*

328. *See id.* at 205–06.

329. *See id.* at 206.

330. *See* Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 245 (D. Colo. 1992) [*Adarand I*].

331. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994) [hereinafter *Adarand II*].

332. *See Adarand III*, 515 U.S. at 227.

333. *See id.*

334. *Id.*

are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[335]

The *Adarand III* decision, as one commentator has stated, "[represented] the culmination of 17 years of Supreme Court litigation on this subject [of race-based classifications]."[336] This commentator also pointed out that the decision also "represents one of few unified pronouncements from the Court on the standard of review required to evaluate equal protection challenges to race-based affirmative action programs."[337]

In *Adarand III*, the Supreme Court did not determine that the federal program at issue was unconstitutional, rather, it remanded the case to the court of appeals for a determination of whether the government's use of racial classifications was justified by a compelling interest and was narrowly tailored.[338]

Even prior to the *Adarand I* decision in 1995, then-President Bill Clinton ordered a review of federal affirmative action programs to determine how the federal programs were designed and whether they "indeed worked" and were fair.[339] The 1995 report, issued in July, concluded that affirmative action programs would advance the goal of equal opportunity by redressing discrimination and that the programs were "fair and non-burdensome."[340] However, the report also noted that the Supreme Court's *Adarand I* decision, which had been reached while the report was being carried out, had changed the landscape of federal affirmative action and required a more thorough empirical analysis which accounted for the new strict scrutiny standard.[341]

In response to the report, President Clinton gave general support to affirmative action programs, and suggested that while some programs needed reform, a "mend it, don't end it" approach should be adopted.[342] Following the Presidential Report, the Department of Justice ("DOJ") commenced a review of federal affirmative action programs to determine whether the programs were in compliance with the Court's decision in *Adarand III*, i.e., whether they would meet the

335. *Id.*

336. Goring, *supra* note 25, at 261.

337. *Id.*

338. *See Adarand III*, 515 U.S. at 237.

339. Memorandum on Affirmative Action, 2 PUB. PAPERS OF PRESIDENT CLINTON 1114 (July 19, 1995).

340. *See id.*

341. *See id.*

342. Remarks on Affirmative Action at the National Archives and Records Administration, 2 PUB. PAPERS OF PRESIDENT CLINTON 1106 (July 19, 1995).

standards of strict scrutiny.[343] Subsequently, the DOJ issued a notice, in which it proposed reforms to the federal affirmative action system.[344]

The initial review focused only on affirmative action programs that were under the federal government's own direct control.[345] It was not concerned with programs that had been undertaken by states and localities pursuant to those jurisdictions' receiving of federal funds from the DOT.[346]

The authors of the DOJ's proposal based their conclusions on evidence that included information Congress had gathered from numerous studies on discrimination that had been conducted by state and local governments nationwide.[347] They concluded that federal contracting, in the absence of affirmative action, would continue to reflect the impact of discrimination against minority businesses and underserved communities.[348] The authors of the DOJ's notice also found that affirmative action in federally-controlled programs was justified and that the federal government had a compelling interest in initiating such programs.[349]

The notice and its supplemental proposed reforms focused on ensuring that the means of securing the congressionally mandated compelling interest of remedying past and present discrimination were narrowly tailored.[350] In the proposal, it was noted that *Adarand* commanded that programs employing race-conscious measures be narrowly tailored.[351] Based on this command, the DOJ proposed statistical "benchmarks" to represent goals for SDB participation in fed-

343. *See generally* Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 (1996) (proposing reforms to the federal affirmative action system).

344. *See id.*

345. *See id.*

346. *See id.* at 26,050.

347. *See id.*

348. *See id.* The authors of the report noted, "All told, the evidence that the Justice Department has collected to date is powerful and persuasive. It shows that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct." *Id.* at 26,051 n.5.

349. *See id.* at 26,042.

350. *See id.*

351. *See id.* Here, the DOJ was careful to point out that its proposed reforms were intended to "target race-conscious remedial measures to markets in which the evidence indicates that discrimination continues to impede the participation of minority firms in contracting." *Id.* at 26,051 n.6.

eral contracts.[352] Under this proposal, the Department of Commerce, in consultation with the General Services Administration, would establish appropriate benchmark standards, regarding minority utilization, for each industry classification.[353] These standards would be compared with the actual minority participation statistics in their respective industry and, in some cases, region.[354]

In arriving at the benchmark standards, the DOJ recommended that they be formulated based on the level of DBE participation "one would reasonably expect to find in a market absent discrimination or its effects."[355] They suggested that these figures be based on census data and the number of SDBs available and qualified to perform the particular work at issue.[356]

Importantly, the report provided that, in addition to calculating the capacity of existing minority firms, "the proposed system [would] examine evidence, if any, demonstrating that minority business formation and operation in a specific industry has been suppressed by discrimination."[357] Such evidence would include direct evidence of discrimination in the private and public sectors in areas such as obtaining credit, surety guarantees and licensing, and would also include evidence of discrimination in pricing and contract awards.[358] The report noted the difficulty in calculating the impact of discrimination in various markets but concluded that "the benchmark limitations represent a reasonable effort to establish guidelines" for the use of race-conscious measures.[359]

Other significant changes to federal affirmative action programs occurred after the *Adarand III* decision. Notably, these factual changes altered the procedural posture and outcome of the remanded *Adarand III* case. The SCC, originally the centerpiece of the federal program, which had been subjected to strict scrutiny, had been discontinued by the time the district court revisited the case. Significant changes to the DOT's DBE programs occurred in 1999 because of the passage of the Transportation Equity Act for the Twenty-First Century—the TEA-21. These changes pertained to the procurement of federal funds for highway projects initiated by states and localities.

352. *See id.* at 26,045–46.
353. *See id.* at 26,045 n.12.
354. *See id.*
355. *See id.*
356. *See id.*
357. *Id.* at 26,045, 26,046 n.13.
358. *See id.* at 26,046 n.13.
359. *See id.*

Following the remand of *Adarand III*, the district court, in *Adarand IV*, concluded that while the government had established a compelling interest for the SCC under strict scrutiny, the statutory presumptions upon which the SCC was based were not narrowly tailored.[360] The court, granting summary judgment for the plaintiff, found that the program was not narrowly tailored to meet the compelling interest of remedying specified discrimination because its design allowed for DBEs who were not in fact "disadvantaged" to benefit from the program.[361] At the same time, the district court asserted, the program failed to help non-minority-owned companies who actually were "disadvantaged."[362]

Following *Adarand IV*, the Court of Appeals, in *Adarand V*, considered the petitioner construction company's case moot.[363] The Tenth Circuit vacated the district court's decision to invalidate the SCC program because Adarand had applied for and was granted SDB-certification by the Colorado DOT.[364] The Supreme Court, however, reversed the Court of Appeal's decision to vacate and remanded the case back to the Tenth Circuit for its consideration of the case's merits.[365] Subsequently, the DOT issued new regulations that suspended the use of the SCC.[366] Additionally, Congress re-authorized the TEA-21, finding that discrimination continued to affect the ability of minority groups to participate in highway construction projects and that race-based programs would be an effective remedy regarding this problem.[367]

Congress debated at length about extending DBE programs and, subsequently, new DOT regulations, which implemented new congressional legislation, were enacted. Importantly, these regulations sought to provide DBE-certification only to those firms that were actually owned and controlled by individuals who were in fact socially and

360. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1577, 1584 (D. Colo. 1997) [hereinafter *Adarand IV*].

361. *See id.* at 1580.

362. *See id.*

363. Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999) [hereinafter *Adarand V*].

364. *See id.* at 1296–97.

365. *See* Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000) [hereinafter *Adarand VI*].

366. *See* Transportation Equity Act for the 21st Century of 1998, Pub. L. No. 105-178 § 1101(b)(1), 112 stat. 107 (1998) [hereinafter TEA-21]. While the Tenth Circuit, in *Adarand V*, was reviewing the district court's ruling, Congress re-enacted the TEA-21.

367. *See id.*

economically disadvantaged, based on individualized showings of economic disadvantage.[368]

For example, the regulations required that owners of firms applying for DBE certification submit a signed and notarized statement that attested to their status as socially and economically disadvantaged.[369] In this statement, the owners had to establish that they had been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[370] The owners also had to confirm that their "ability to compete in the free enterprise system [had] been impaired due to diminished capital and credit opportunities as compared to others in the same business area who [were] not socially disadvantaged."[371]

In essence, the new regulations sought to guard against over-inclusiveness. The statutory presumption that certain groups are considered socially disadvantaged because of their minority status remained, but was nonetheless rebuttable.[372] Now, individuals who were not among the minority groups that enjoyed the statutory presumption could still qualify for DBE-certification by proving that they were socially and economically disadvantaged under the SBA standards.[373]

Other aspects of the new regulations represented an effort to narrowly tailor particular remedies. The new DOT regulations asked recipients to set their annual goals for DBE-participation, based upon local market conditions.[374] Unlike the prior program, the statutory ten percent utilization goal was a national aspiration.[375] Moreover, each recipient of the program's benefits had to establish his or her own DBE-utilization goals, based on their own methodology.[376] When developing these plans to meet their overall goals, recipients had to

368. 49 C.F.R. § 26.67 (2000). This "individualized showing" requires an applicant/business owner to attest to his personal net worth, while submitting the appropriate documentation to support this attestation. If an applicant's net worth exceeds $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for DBE-certification. *Id.*

369. *See id.*

370. 15 U.S.C. § 637(a)(5) (2000).

371. *Id.* § 637(a)(6).

372. *See* 49 C.F.R. § 26.67(a)(1), (b)(2) (2000).

373. *See id.* § 26.67(d).

374. *See id.* § 26.45(c)(5).

375. *See id.* § 26.41(c).

376. *See id.* § 26.45(b).

use race-neutral means to involve DBEs before resorting to race-conscious methods.[377]

A. The Government's Showing of Discrimination Under Strict Scrutiny

In *Adarand Constructors, Inc. v. Slater* (*Adarand VII*),[378] the Tenth Circuit finally addressed the question of whether the government had established a compelling interest for employing the (now defunct) SCC to remedy the effects of racial discrimination. While acknowledging that Congress had the power to address racial discrimination that had been or was currently being carried out by the states, the court held that the federal government had a compelling interest in not perpetuating the effects of racial discrimination regarding the way in which it chose to distribute its own federal funds.[379]

The court of appeals then determined whether the actual evidence proffered by the government established a strong basis in evidence of the existence of past and present discrimination in the publicly funded highway contractor market.[380] In examining the evidentiary basis for Congress' case, the court noted that Congress had previously considered the issue of discrimination in government-created contracts.[381] The court cited to the DOJ's *Proposed Reforms to Affirmative Action in Federal Procurement*, where Congress had conducted over thirty public hearings concerning minority businesses.[382] The court determined that statements from public hearings, made by public officials, and congressional reports did not themselves establish evidence of discrimination.[383] However, the court found support for the argument that discrimination existed, where the government had presented evidence of two kinds of discriminatory barriers to the utili-

377. *See id.* § 26.51(a)–(b). The new regulations provide that agencies are to arrange solicitations of firms to include all small businesses, not just disadvantaged business. Further, technical, bonding and financial assistance may be provided, as means of accomplishing the "race-neutral" requirement. Even if a contract goal is set and not met, a prime contractor that demonstrates that it has made a good faith effort to achieve these goals, must be awarded the contract. *See id.* § 26.53(a).

378. 228 F.3d 1147 (10th Cir. 2000) [*Adarand VII*].

379. *See id.* at 1165.

380. *See id.* at 1166–1175.

381. *See id.* at 1178.

382. *See id.* at 1167 (citing to Proposed Reforms to Affirmative Action in Federal Procurement, *supra* note 343). The court of appeals also took judicial notice of hearings that had been conducted before, and testimony that had been presented to, congressional committees and subcommittees of the government. *Adarand VII*, 228 F.3d at 1167.

383. *See id.* at 1166.

zation of minority subcontracting, which established a link between federal funds and private sector discrimination.[384]

After noting that the City of Denver in *Concrete Works* had not demonstrated the necessary showing of discrimination to justify its MBE program, the court of appeals stated:

> [T]he evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.[385]

The court of appeals found that those two barriers, i.e., obstruction of business formation and hindrance to fair competition between minority and non-minority enterprises, were due to private sector discrimination.[386] With regard to business formation, the court of appeals found that the anecdotal and statistical evidence, derived from numerous congressional hearings and investigations, indicated that prime contractors, unions, and financial lenders, impeded the formation of minority firms.[387] According to the court, the evidence showed, among other things, that 1) prime contractors, through the existence of "old boy networks," refused to employ minority subcontractors; 2) subcontractors' unions' blocked minority subcontractors'

384. *See id.*

385. *Id.* at 1167–68. The court cited congressional reports that had made clear that the construction industry was a generalized family business, requiring family connections in order to become a valid competitor within the "business." *See id.* at 1168 (citing H.R. REP. No. 103-870, at 15 n.36 (1994); citing also Proposed Reforms to Affirmative Action in Federal Procurement, *supra* note 343, at 26,054–58). In examining what evidence demonstrated a compelling interest, the court of appeals looked at public and private discrimination not only in government procurement, but also in the contracting industry generally, recognizing that "any findings Congress has made as to the entire construction industry are relevant." *Adarand VII*, 228 F.3d at 1167 (citing Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1523, 1529 (10th Cir. 1994)).

386. *See Adarand VII*, 228 F.3d at 1170.

387. *See id.* at 1168.

access to union membership, which is a condition for receiving work in the business; and 3) lending institutions engaged in discriminatory lending practices and discriminatorily denied MBEs access to capital, which stymied the formation of minority businesses.[388] Regarding this last finding, the court of appeals found that "the government's evidence [was] particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises [would have been] stymied."[389]

As for the competition barrier, the court of appeals acknowledged, again, that based on congressional hearing investigators' findings, discrimination practiced by prime contractors, business networks, suppliers, and bonding companies and carried out in accordance with private sector custom, fostered an "uneven playing field for minority subcontracting enterprises."[390] According to the court, the government presented powerful evidence that supported the conclusion that, where affirmative action plans had not been enacted, the construction industry remained a closed network with longstanding relationships, which served to exclude MBEs from bidding on subcontracts.[391] The court of appeals stated, "the government has also presented sobering evidence that when minority firms are permitted to bid on subcontracts, prime contractors often resist working with them."[392]

The court further noted that Congress had found the systematic exclusion of MBEs to be the result of sometimes-outright racism.[393] The court cited to and quoted from testimony given at congressional hearings following *Croson*, which were held before the subcommittees on civil rights.[394] One witness had stated, "we must not for a moment

388. *Id.* at 1168–69. The court cited numerous local studies and a significant amount of testimony that was presented at various congressional hearings. *See e.g., Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Fin. Insts. Supervision, Regulation & Deposit Ins. of the House Comm. on Banking, Fin. & Urban Affairs*, 103d Cong. 19–20 (1994) (statement of Toni Hawkins, Executive Director, National Black Business Council); *Disadvantaged Business Set Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation & Minority Enter. Dev. of the House Comm. on Small Bus.*, 100th Cong. 26 (1988) (statement of Joann Payne, President, PSM Consultants).

389. *Adarand VII*, 228 F.3d at 1169.

390. *Id.* at 1170.

391. *See id.* at 1170.

392. *Id.*

393. *See id.* at 1171.

394. *See id.* (citing *How State and Local Governments Will Meet* Croson *Standard (Minority Set-Asides): Hearing Before the Subcomm. on Civ. & Const. Rights of the House Comm. on the Judiciary*, 100th Cong. 53–54 (1989)).

underestimate the role of continuing pervasive blunt discrimination by the private market."[395]

Additionally, the court of appeals found that MBEs were unable to compete with non-minority firms due to bonding discrimination and an old boy network in bonding that served to exclude minority firms.[396] The court of appeals also found that the government had demonstrated that discrimination was carried out by suppliers, where non-minority firms received special prices for goods and services.[397] The court of appeals concluded that Adarand had failed to meet its burden of rebutting the government's showing of discrimination in the federal construction subcontracting market.[398] Specifically, the court of appeals rejected Adarand's characterization of the various congressional reports offered by the government and its attempt to find fault with the methodology employed by the government regarding the local disparity studies' use of "supplemental evidence."[399] Rejecting petitioner's criticism of Congress' reliance on local disparity studies, which petitioner characterized as conclusory and unreliable, the court of appeals concluded that the government had established a strong basis in evidence of pervasive discrimination as a matter of law.[400] Subsequently, the court held that Congress could take action to remedy the specific racial discrimination evinced by Congress and to remedy such discrimination's lingering effects in the construction

395. *Adarand VII*, 228 F.3d at 1171 (citing *How State and Local Governments Will Meet* Croson *Standard (Minority Set-Asides): Hearing Before the Subcomm. on Civ. & Const. Rights of the House Comm. on the Judiciary*, 100th Cong. 53–54 (1989) (statement of Marc Bendick, Bendick & Egan Economic Consultants, Inc.)).

396. *See Adarand VII*, 228 F.3d at 1171–72 (citing Proposed Reforms to Affirmative Action in Federal Procurement, *supra* note 343, at 26,059–60). The court cited to numerous congressional hearings and a significant amount of testimony, finding that there was strong overt racial discrimination in the bonding market. *See id.* at 1171. The court also cited to testimony from local Louisiana and Atlanta disparity studies, within which the existence of disparities between minority firms' and non-minority firms' ability to obtain bonding was evinced. *See, e.g., id.* at 1172 (citing City of Richmond v. J.A. Croson: *Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Bus. Dev. of the Senate Comm. on Small Bus.*, 101st Cong. 40–41, 43 (statement of Andrew Brimmer, President, Brimmer & Co., Inc., Economic and Financial Consultants)).

397. *See Adarand VII*, 228 F.3d at 1172.

398. *See id.* at 1174.

399. *See id.* at 1175. The court stated, "We reject the decidedly vague urgings of Adarand's amici curiae to reject disparity studies as biased and/or insufficiently reliable." *Id.* at 1174 n.14.

400. *See id.* at 1175.

industry.[401] Importantly, the court noted that Congress need not stand idly by and only proscribe anti-discrimination policies.[402]

With respect to *Adarand III*'s and *Croson*'s narrow tailoring requirement, the court of appeals found that the SCC, which had been used as a financial incentive to encourage primary contractors to hire DBEs, was unconstitutional.[403] Furthermore, the court held that the presumption that certain minority groups and women were economically disadvantaged, solely because of their status as minorities or women, was unconstitutional because actual need for assistance was not based on actual individual circumstances.[404]

Other aspects of the program, however, *were* found to be narrowly tailored, as amended under the new certification regulations.[405] The appeals court noted that the new regulations provided a rebuttable presumption of "social disadvantage" and in order to establish this presumption, the applicant would have to "submit a narrative statement describing the circumstances of the purported economic disadvantage."[406] The court found that the new regulations were narrowly tailored because they had delineated limits on DBE participation—an important factor to include, to ensure narrow tailoring, in the design of any race-conscious relief program.[407] The court found that the new

401. *See id.* at 1175–1176. The court stated that the evidence demonstrated that race-based barriers to entry into the industry and the ongoing effects of race-based impediments to success, faced by minority contracting enterprises, are caused by either continuing discrimination in the relevant market or "lingering effects of past discrimination." *See id.* at 1176. The Tenth Circuit further contrasted the government's showing of the lingering effects of discrimination with the local government's showing of the same in *Concrete Works*. *See id.* at 1175–76. There, the court held that the plaintiff had specifically identified and put forth evidence showing statistical flaws in the data, justifying the City of Denver's affirmative action case, thus precluding summary judgment. *See* Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1530-31 (10th Cir. 1994).

402. *See Adarand VII*, 228 F.3d at 1176.

403. *See id.* at 1179.

404. *See id.* at 1184–85. "Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, we conclude that the 1996 SCC was insufficiently narrowly tailored as applied in this case and is thus unconstitutional under *Adarand III*'s strict standard of scrutiny. Nonetheless, after examining the current SCC and DBE certification programs, we conclude that the 1996 defects have been remedied, and the relevant programs now meet the requirements of narrow tailoring." *Id.* at 1187.

405. *See id.* at 1179. For instance, the regulations provide that recipients must meet the "maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation." 49 C.F.R. § 26.51(a) (2000).

406. *Adarand VII*, 228 F.3d at 1185.

407. *See id.* at 1180.

programs were appropriately limited to last no longer "than the discriminatory effects [they were] designed to eliminate."[408]

The *Adarand* decision was of course appealed by Adarand to the Supreme Court. The appeal was foreseeable, considering that the court of appeals' decision was the first to have addressed the constitutionality of the DOT's DBE program, following *Adarand III*, and the first to have found that the government had met its burden of presenting a compelling state interest in this context. The ultimate *Adarand* case would serve as the litmus test for future federal affirmative action programs.

After much anticipated legal and political debate, the new administration under President George Bush decided to defend the constitutionality of its federal DBE program. Before the Supreme Court, United States Solicitor General Theodore Olson defended the Clinton administration's "mend it, don't end it" policy on affirmative action.[409] However, the government's position was based on the newly-implemented regulations regarding race-conscious relief.[410]

In oral argument before the Supreme Court, Solicitor General Olson argued that petitioner, who had since been certified as a DBE, had not lost a single contract because of the federal programs.[411] Moreover, he asserted, the revised race-conscious program at issue was no longer in use in Colorado.[412] Olson argued that the benefits of the new program could only be realized by those DBEs who could show that they had actually been victims of prejudice or bias in the past.[413] He explained that, under this new program, business owners seeking certification as DBEs were now required to submit signed and notarized statements acknowledging that they were socially and economically disadvantaged.[414] In addition, DBEs had to disclose their DBE owner's personal net worth under the program's requirements.[415]

408. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238(1995) [*Adarand III*]).

409. *See* David Savage, *Unlikely Backer of Affirmative Action Emerges; Race: Conservative Solicitor General Defends Clinton-Era Policy*, L.A. TIMES, Nov. 1, 2001, at A26.

410. *See id.*

411. *See* Savage, *supra* note 409, at A26.

412. *See id.*

413. *See id.*

414. *See id.*

415. *See* 49 C.F.R. § 26.67(a) (2001). A group of social science and comparative law scholars argued that the Tenth Circuit Court of Appeals made a critical error in its interpretation of the regulations applicable to the affirmative actions issue in the *Adarand* case. These scholars maintain that the presumption of economic disadvantage remains in place with only one modification—the presumption is conclusively rebutted if a business owner's

Thus, the program's new design served to benefit only those businesses that had actually and personally been negatively impacted by discrimination.

Despite Olson's arguments, the Court failed to address the merits of the new regulations of the 1998-amended federal DBE program. The government argued that petitioner Adarand lacked standing to challenge the particular regulations before the Court.[416] The DBE program before the Court and referenced in the Court's agenda regarding its grant of certiorari pertained to federally-assisted state and local contracts which had been drafted under the DOT regulations. The particular claim Adarand had raised in its brief before the Supreme Court, however, addressed direct federal procurement programs, which had been based on a presumption of social and economic disadvantage based on race and gender.[417] This difference in focus was viewed by the court and the government as an important deviation from what the Court had been prepared to address in accordance with its granting of certiorari.[418] Moreover, the Tenth Circuit had not addressed the constitutionality of the direct federal procurement program, which Adarand had been challenging.[419]

As a result of this conflict, much of the oral argument was subsequently dedicated to the resolution of the procedural issue of standing. What had been labeled as a blockbuster affirmative action case had become bogged down by procedural issues. The Supreme Court had been faced with an opportunity to resolve an issue of national importance—whether the federal government's showing of discrimination was sufficient to meet strict scrutiny to justify its new and allegedly more narrowly-tailored race and gender-based, and race-neutral program. However, the Court, exercising its judicial restraint, unani-

personal net worth "exceeds $750,000," thus, the $750,000 cap keeps a presumption of disadvantage below the threshold. Regulations for DBE programs continue to presume that members of the designated minority group are economically disadvantaged. *See* Clark D. Cunningham, *Should the Government Confess Error in Adarand Constructors?, at* http://law.wustl.edu/equality/AD-ERROR.html (Sept. 14, 2001).

416. *See* Savage, *supra* note 409.

417. Under the TEA-21, Pub. L. No. 105-178 § 1101(b)(1), 112 stat. 107 (1998), Congress required that states expend no less than ten percent of federal highway funds on DBE provided services. It incorporated the SBA's definition of disadvantaged businesspersons. Federal regulations required that recipient's receipt of federal monies be conditioned on establishing state DBE programs.

418. *See generally* Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) (dismissing certiorari as improvidently granted).

419. *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1160 (10th Cir. 2000) [*Adarand VII*]. The court of appeals noted that Adarand lacked standing and had waived his rights to challenge any other race-based program.

mously dismissed the writ of certiorari as "improvidently granted," declining to review both the standing issues and the constitutional challenge to the federal procurement program.[420] Thus, *Adarand*, once again, left unresolved the question of how the federal government can meet the requirements of strict scrutiny under the Constitution's Equal Protection Clause and left in doubt the validity of federal DBE programs in other jurisdictions.[421]

One of the central issues left unresolved was whether Congress' findings regarding the existence of discrimination were substantial enough to withstand strict scrutiny. The court of appeals did not address the issue of the extent to which Congress has the authority to redress discrimination under Section Five of the Fourteenth Amendment. Furthermore, the question remained as to the type and amount of evidence necessary for the federal government's DBE programs to be able to meet strict scrutiny where Congress is the fact-finder. Some Justices and judges have observed that more deference is afforded to Congress, as compared to state legislatures, in its fact-finding process and that the nature of the evidence necessary to justify strict scrutiny has depended on the governmental actor initiating the MBE program.[422] Is the nature of evidence required under *Adarand*, to justify race-based relief initiated by Congress, different from the evidence required from state and local governments under *Croson*'s strict scrutiny standard?

In *Adarand VII*, the court of appeals cited congressional references to numerous local disparity studies to support factual predicates.[423] However, when the same studies were reviewed by lower courts, the courts were highly critical of *Croson* and the lack of guidance that case provided to them.[424] Recent challenges to federal DBE programs are illustrative of the divergent approaches courts have

420. *See Adarand*, 534 U.S. at 105. The Court noted that petitioner had raised the standing issue only three weeks before oral argument and only in its reply brief. *See id.* at 109.

421. *See* Clark D. Cunningham, Glenn C. Lowry & John David Skrentny, *Passing Strict Scrutiny: Using Social Science To Design Affirmative Action Programs*, 90 GEO. L.J. 835, 850 (2002).

422. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989). Justice O'Connor wrote, "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

423. *See Adarand VII*, 228 F.3d at 1172–74.

424. *See id.*

used to review the sufficiency of evidence offered to establish evidence of discrimination.[425]

In *Sherbrooke Turf*, plaintiff landscaping corporation, which was owned by Caucasian males, challenged the federal DBE program administered by the state of Minnesota under the TEA-21, claiming that it was unconstitutional under the Equal Protection Clause.[426] More particularly, Sherbrooke claimed that the *Adarand VII* court's review of the congressional findings related to the passage of the TEA-21 was "insufficiently rigorous and less demanding than that required by strict scrutiny."[427] Sherbrooke claimed that the Supreme Court's decision in *Kimel v. Florida Board of Regents*[428] mandated an independent judicial assessment of congressional findings that pertained to discrimination.[429] The district court disagreed, noting that, while the Supreme Court had required that courts take a closer look at Congress' findings with the intent of determining the extent to which a federal program seemed to be piercing a state's sovereign immunity, such a meticulous search was not required under the Fourteenth Amendment's enforcement powers.[430] The district court cited *City of Boerne v. Flores*[431] and *Kimel*, where the Supreme Court had decided that congressional findings are entitled to greater deference than local or state findings under the Fourteenth Amendment.[432]

Additionally, plaintiff had requested that the court review every document considered by Congress, when Congress made its decision that a DBE program should be created, in order for the court to be able to independently determine the validity and worthiness of defendant's alleged compelling interest. The district court considered this request to be "fatally flawed."[433] The court stated, "This court has no reason to suspect or doubt either the Tenth Circuit's or Congress's

425. *See* Cunningham, *supra* note 421. There have been a number of post-*Adarand* challenges to federal transportation and defense programs that employ race-based disadvantaged business plans. *See generally* Klaver Constr. Co. v. Kan Dep't of Transp., 211 F. Supp. 2d 1296 (D. Kan. 2001); Rothe Dev. Corp. v. U. S. Dep't of Def., 262 F.3d 1306 (Fed. Cir. 2001); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., No. 00-CV-1026, 2001 WL 1502841 (D. Minn. 2001); Gross Seed v. Neb. Dep't of Transp., No. 4:00-CV-3073 (D. Neb. May 6, 2002).

426. *See Sherbrooke Turf*, 2001 WL 1502841, at *1.

427. *See id.* at *6.

428. 528 U.S. 62 (2000).

429. *See Sherbrooke Turf*, 2001 WL 1502841, at *6.

430. *See id.*

431. 521 U.S. 507 (1997).

432. *See id.* (citing *Boerne*, 521 U.S. at 636; citing also *Kimel*, 528 U.S. at 81).

433. *See Sherbrooke Turf*, 2001 WL 1502841, at *6.

ability to ascertain and understand evidence related to the need for affirmative action in federal highway construction programs."[434]

The district court granted defendant's motion for summary judgment, finding that Congress had a sufficient evidentiary basis upon which it could conclude that racism and discrimination in the highway subcontracting industry warranted the implementation of a race-conscious program.[435] While acknowledging that states and local affirmative action programs must demonstrate a strong basis in evidence of discrimination, the court stated, "TEA-21 is not . . . a state or locally based program. It was enacted by a Congress which made appropriate findings . . . . When Congress establishes a constitutionally valid nationwide program, the federal courts afford greater deference to its national policy decisions."[436]

The court also found that the new TEA-21 program did not burden non-minority contractors because the program was now narrowly tailored, in that it utilized an economic, rather than race-based standard to determine which businesses were actually disadvantaged.[437] Although non-DBEs would invariably bear some burden, the court found that the government had established a sufficient link between the DBE program and the discrimination the program was designed to counter to justify remedial action.[438]

A contrary view to the way in which Congress should be required to make a showing of discrimination was expressed by a federal district court in *Rothe Development Corporation v. United States Department of Defense* (*Rothe Development I*).[439] This case involved a challenge to another federal government-initiated DBE, which was enacted under the Department of Defense ("DOD").[440] In *Rothe Development I*, an unsuccessful bidder challenged the DOD's program—Section 1207 of the National Defense Authorization Act of 1987—under the equal protection component of the Fifth Amendment, contending that the government lacked the necessary evidentiary support to justify its race-based relief program.[441] The district court, using a fairly deferential

434. *Id.*

435. *See id.* at *6, *11.

436. *Id.* at *11.

437. *See id.* at *8.

438. *See id.* The Court noted that the new regulations, importantly, incorporated race-neutral elements into the DBE program, requiring contractors to use race-neutral means over race-based means when possible. *See id.* at *2 (citing 49 C.F.R. § 26.51(a) (2000)).

439. 49 F. Supp. 2d 937 (W.D. Tex. 1999) [hereinafter *Rothe Dev. I*].

440. *See id.* at 941.

441. *See id.* at 945. The section 1207 program set a statutory goal of five percent participation by DBEs in DOD programs. *See* 10 U.S.C. § 2323(a)(1) (2000).

strict scrutiny test, found that the program, which had employed a race-based evaluation system that served to benefit socially and economically disadvantaged bidders, was constitutional.[442]

At issue was the government's use of a price-evaluation system that would increase the dollar amount of the bids of non-SDB bidders by as much as ten percent, so that a federal goal of awarding five percent of defense contracts to SDBs could be achieved.[443] The government argued that Congress had sufficient evidence upon which it could be concluded that the DOD had at least been "a passive participant" in the past, private discriminatory conduct that had been carried out against minorities, preventing them from obtaining defense contracts.[444] The government also argued that post-enactment evidence, which had been compiled subsequent to the adoption of its 1992 program, supported the program's constitutionality.[445]

In evaluating the program under strict scrutiny, the district court employed a deferential standard of review to the congressional-based action.[446] The district court pointed out that some of the Justices who had sided with the plurality in *Croson* and *Fullilove* had indicated that since, in those cases, Congress had employed broader remedial powers than other governmental bodies had employed, congressional findings would be entitled to greater deference than that typically afforded to state or local bodies.[447] Following the reasoning laid out in those cases, the court in *Rothe* upheld the constitutionality of the government's program.[448]

The court of appeals, in *Rothe Development II*, disagreed with the lower court, finding that *Croson* provided no basis upon which courts could apply a watered-down version of strict scrutiny, which ap-

442. *Rothe Dev. I*, 49 F. Supp. 2d at 954.

443. *See id.* at 942.

444. *See id.* at 950.

445. *See id.*

446. *See id.* at 945. While the Fourteenth Amendment limits state action, it also constitutes a grant of federal power to remedy prior discrimination. *See id.* at 942. Section Five of the Fourteenth Amendment expressly authorizes Congress "to enforce by appropriate legislation, the provision of the Fourteenth Amendment." The term "enforce" has been interpreted to have a remedial meaning, as opposed to an authority to substantively relieve. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000).

447. *See Rothe Dev. I* at 943–44, 950. The district court stated that *Adarand III* had left undisturbed the various Justices' previously-expressed views on Congress' broad remedial powers. *See id.* at 944. Since no Justice had repudiated those views, the district court concluded that "a majority of the Court would favor some standard that allowed Congress a broader brush than it would allow states with which to design remedial measures for the purpose of addressing nationwide discrimination." *Id.* at 944.

448. *See id.* at 954.

proached a type of mid-level scrutiny, regarding congressional programs.[449] The court of appeals noted that while the district court was correct with respect to using deferential review regarding Congress' Section Five powers, it had not correctly identified the issue before the court because section 1207 of the National Defense Authorization Act was enacted pursuant to Congress' Article I powers.[450] The court stated that the section 1207 program was enacted pursuant to Article 1, as set forth in *Adarand III*.[451] Accordingly, the court determined that Congress was not entitled to deference regarding a court's determination of whether Congress had a compelling interest in enacting a race-based program.[452]

Interestingly, in remanding the case to the district court, the court of appeals stated in a footnote that the fact that Congress is not entitled to deference in its enacting of race-based relief does not mean that Congress is not entitled to deference regarding the validity of the evidence it has uncovered in its fact-finding process.[453] The appeals court noted that the fact-finding process of legislative bodies is entitled to a presumption of regularity and deferential review by the judiciary.[454] Thus, congressional hearings and testimony would presumably not be subject to the kind of de novo review of fact-finding undertaken by some federal courts in reviewing evidence of state and local governments.

The court of appeals next addressed the question of whether the government's use of post-enactment evidence, to support the asserted compelling interest of remedying discrimination as a basis for its enacting social classification programs, was legitimate.[455] The court analyzed the district court's reliance on the federal government's 1998 benchmark study, as well as evidence from a brief from the Asian American Legal Defense and Education Fund, to support the district

449. *See* Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1321 (Fed. Cir. 2001) [hereinafter *Rothe Dev. II*].

450. *See id.* Congress' powers under Article I are more limited than under Section Five of the Fourteenth Amendment. Under Article I, Congress is given power to appropriate funds for the armed forces.

451. *See id.*

452. *See id.* The court noted, that the section 1207 program, like the program in *Adarand III*, was enacted pursuant to Article I powers, meant that the Court "intended there to be only one kind of strict scrutiny, applied with the same level of rigor to both state/municipal racial classifications and federal racial classifications enacted under Congress' Article 1 power." *Id.* at 1319.

453. *See id.* at 1322 n.14.

454. *See id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

455. *See Rothe Dev. II*, F.3d at 1325.

court's finding that the government had a compelling interest in remedying discrimination in government contracting.[456]

While the appeals court noted that circuit courts had allowed the use of post-enactment evidence which was compiled before the re-authorization or re-enactment of race-based programs, it asserted that "[t]he use of post-enactment evidence to justify the constitutionality of a program, as enacted, present[ed] a more difficult question."[457] The circuit court acknowledged that other circuits were split regarding the propriety of the use of post-enactment evidence to demonstrate that a strong basis in evidence of discrimination existed *before* race-based programs had been enacted.[458]

The court of appeals examined the "strong basis in evidence" language of *Wygant* and *Croson*, and acknowledged that some courts have held that the evidentiary burden required of a legislature, regarding its fact-finding process, is substantially less than the standard of review required of the legislature when its program is challenged in court.[459] However, the court of appeals felt that more recent Supreme Court cases had concluded that there was no difference regarding the strong basis in evidence standard, whether the standard was being applied during litigation or to legislative fact-finding that had been conducted before the government had enacted a race-based classification program.[460] The court relied on the Supreme Court's rulings in *Shaw v. Hunt*[461] and *Bush v. Vera*.[462] In both voting rights cases, the Supreme Court held that redistricting plans must be based on a strong basis in evidence before Congress can take race-based remedial action.[463]

Based on this precedent, the court of appeals in *Rothe* concluded that if the pre-reauthorization evidence offered by the government is insufficient to maintain a program when the program is challenged

456. *See id.* at 1324–25.

457. *Id.* at 1325.

458. *See id.* at 1326.

459. *See id.*

460. *See id.*

461. 517 U.S. 899 (1996).

462. 517 U.S. 952 (1996).

463. *See Rothe Dev. II*, 262 F.3d at 1326–27. In a footnote, the court of appeals pointed out that although *Shaw* was a racial gerrymandering case, the Supreme Court's traditional practice allows for Justices to rely on the precedents set in factual situations other than the present one, such as employment or education in this instance, where racial classifications are employed. *See id.* at 1327 n.19. In accordance with this Supreme Court practice, the author believes that other precedents should be explored in order to establish a suitable framework for courts to follow when they are dealing with federal race-based programs. *See* discussion *infra* Part III.

on constitutional grounds, then the program must be invalidated, regardless of the strength of the post-reauthorization evidence offered.[464] In other words, there must be sufficient pre-enactment evidence to support a program to create a "strong basis in evidence."[465] The court did recognize that a "governmental body . . . reauthorizing . . . a statute . . . has the opportunity to inspect all evidence post-dating enactment but pre-dating reauthorization."[466] "Therefore," the court maintained, "in assessing the constitutionality of a statute in an equal protection context, a reviewing court should be able to consider all evidence available to Congress pre-dating the most recent reauthorization of the statute at issue."[467]

In applying the "strong basis in evidence" standard, the court found that the district court had engaged in only a cursory analysis of the evidence that had been before Congress at the time the section 1207 program had been reauthorized.[468] The court of appeals pointed out that the lower court had merely listed all the reports and materials that Congress had considered before it had enacted its program.[469] Noting that *Croson* requires that remedies be enacted only to rectify identified systemic discrimination, the court found that the preauthorization evidence relied on by the district court to reach its holding was insufficient to show systemic discrimination against Asian–Americans, which was a minority group the program was designed to assist.[470]

The court of appeals also criticized the district court's lack of reliance on statistical evidence to justify its remedial program, noting that "nearly every court of appeals upholding the constitutionality of a race-based classification has relied in whole or in part on statistical evidence."[471] According to the court, the only statistical preauthorization evidence offered by Congress, and relied upon by the lower court, had been a "statement in a 1975 House report that 'only three percent of American businesses were owned by minorities, while minorities made up sixteen percent of [the] population.'"[472] In conclusion, the court further held that the district court had impermissibly

464. *See Rothe Dev. II*, 262 F.3d at 1327–28.
465. *See id.*
466. *Id.* at 1322 n.15.
467. *Id.*
468. *See id.* at 1322.
469. *See id.*
470. *See id.* at 1323.
471. *Id.* at 1323–24.
472. *Id.* at 1324 (citation omitted).

used post-enactment evidence to justify the reauthorization of Congress' section 1207 program.[473]

The court of appeals remanded the case to the district court, instructing it to engage in a "non-deferential analysis that applies to state or municipal racial classification."[474] The court gave specific guidance to the district court, ordering it to not only make findings as to whether the section 1207 program was actually remedial in nature, but also to determine whether the remedy it alleged to provide was actually aimed at countering present discrimination or the lingering effects of discrimination.[475] The court further instructed that if it was a case revolving around a showing a past discriminatory effects, then the district court was to make an independent assessment as to whether the evidence was still probative, i.e., "whether the effects of past discrimination [had] attenuated over time, or . . . whether the lingering effects [were] still present or were present in 1998 when the 1207 program was applied."[476]

Moreover, as to the narrow tailoring element of strict scrutiny, the appeals court reviewed the district court's exclusive reliance on the government's Benchmark Study in assessing whether the government's five percent goal was sufficiently proportional to the discrimination the program was allegedly designed to address.[477] Since the Benchmark Study had been conducted after the 1992 reauthorization of the program, the court of appeals asserted that the study was not relevant to a determination of the proper goals for the program when it was reauthorized in 1992.[478]

The court further instructed the district court to determine whether the section 1207 program was over-inclusive with regards to whether each of the five minority groups included within the 1207 program had actually suffered from the lingering effects of discrimination.[479] The court noted that the 1207 program had included a presumption of social and economic.[480] The Court of Appeals for the Tenth Circuit held that for the program to be "narrowly tailored,"

473. *See id.* at 1324.

474. *Id.* at 1329.

475. *See id.*

476. *Id.*

477. *See id.* at 1331.

478. *See id.* at 1331–32.

479. *See id.* at 1332. The groups presumed to be disadvantaged under the section 1207 program were Black Americans, Hispanic Americans, Native Americans, Asian Americans, and Subcontinent Asian Americans. *See id.* at 1314 n.4.

480. *See id.* at 1332.

Congress had to submit sufficient evidence to show that it had made an individualized showing of disadvantage, with regards to the groups of people that were alleged to have been disadvantaged and so would properly benefit from the program.[481]

A case that involved a program similar to the challenged TEA-21 program was *Gross Seed v. Nebraska Department of Transportation.*[482] Plaintiff Gross Seed Company filed suit against the Nebraska Department of Roads ("NDOR"), challenging the constitutionality of NDOR's program.[483] The DOT and FHWA were subsequently named as defendants.[484] NDOR operated a program pursuant to 49 C.F.R., section 26.1, which governs the participation of DBEs in DOT financial assistance programs.[485] The federal government intervened in the case, urging the district court to apply the analysis used, and to adopt the same conclusions reached by the Tenth Circuit in *Adarand VII,* where the court had upheld the federal government's race-conscious program.[486]

In *Gross Seed,* the government reminded the court that a "bipartisan majority of Congress had explicitly recognized [that the TEA-21 was] necessary to remedy discrimination in construction."[487] Using evidence similar to the evidence it had presented in *Adarand,* the government contended that Congress had several bases upon which it had determined that discrimination had hindered the ability of minorities and women to compete in the construction marketplace.[488] The Urban Institute Study served to provide the factual predicate upon which Congress had enacted its program.[489] The study presented various statistics gathered from local disparity studies, and found "statistical underutilization of Black, Hispanic, Asian and Native American owned companies."[490] Finally, the government argued that other federal courts, which had considered the constitutionality of

481. *See id.* New government regulations established in 2000 showed the need for an individualized showing of economic disadvantage for each minority included within a race-based program. 13 C.F.R. § 124.1002(a) (2002).

482. Gross Seed v. Neb. Dep't of Transp., No. 4:00-CV-3073 (D. Neb. May 6, 2002).

483. *See id.*

484. *See id.*

485. 49 C.F.R. § 26.1 (2000).

486. See Brief of the Government Intervenor, *Gross Seed* (No. 4:00-CV-3073).

487. *See id.*

488. *See id.*

489. *See id.*

490. *See id.*

federal race-based programs, had found such programs to be supported by a compelling interest.[491]

The district court was convinced by the government's evidence, which it had used to establish a compelling governmental interest.[492] Accordingly, the district court upheld the federal program.[493] The court referred to the lower court decisions of *Sherbrooke* and *Rothe*, where those courts had recognized that congressional fact-finding should be afforded leeway regarding its function as a tool for establishing a factual predicate to support Congress' compelling interest claim, regarding race-based remedies.[494] Those courts realized that Congress is not an amalgam of state and local governments, but that it must independently engage in national fact-finding in order to establish a single national policy.[495] Even the appeals court in *Rothe* had recognized that Congress is entitled to a presumption of regularity regarding the facts it uncovers in its fact-finding process, even when the facts at issue are the same or similar to those that had been relied upon by state and local governments, which had not been afforded deference.[496]

Some district courts have accepted the government's compelling interest evidence as supportive of a legitimate factual predicate. Some commentators and plaintiffs, however, have criticized Congress' reliance on evidence derived from local disparity studies.[497] The *Adarand VII* court, not agreeing with these commentators and plaintiffs, and in part relying on the government's Urban Institute Study, found that the government had established a strong basis in evidence of remediable discrimination as a "matter of law."[498] Findings of private national discrimination hindering fair competition between minority and nonminority enterprises, regarding contractors' ability to obtain bonding and supplies and to access accurate business networks, have been found to exist at the local levels at levels comparable to those at the national level.[499] Additionally, congressional citations to local dispar-

491. The government cited to *Sherbrooke, Rothe I* and *Adarand VII. See Gross Seed* (No. 4:00-CV-3073).

492. *See id.*

493. *See id.*

494. *See id.*

495. *See id.*

496. *See* Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1322 n.14 (Fed. Cir. 2001).

497. *See* discussion *supra* note 106.

498. *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1175 (10th Cir. 2000) [*Adarand VII*].

499. *See id.*

ity studies in Louisiana and Atlanta and anecdotal evidence were relied upon in helping to establish the congressional factual predicate.[500] Yet, the same evidence was given little weight when evaluated by the lower courts. The Supreme Court's dismissal of certiorari in *Adarand III* prevented the Court from making a definitive holding regarding the necessary factual predicate for Congress to have to establish regarding its use of race-based programs.

III. Dealing with an Imprecise Framework

Unlike the federal government, state and local jurisdictions have found it difficult to establish a strong basis in evidence of discrimination sufficient to meet the strict scrutiny standard of *Croson*. In large measure, this represents the difficulties of proving discrimination under the Court's equal protection jurisprudence of proving discriminatory intent. Although discrimination in the business context is proven in the same way as any other form of discrimination, through direct and circumstantial evidence and by rational inference-drawing, the existence of discrimination in the business context is more difficult to uncover. In the business context, absent evidence of contractors' outright refusal to accept bids from minority vendors because of race or sex, courts must focus on whether more subtle forms of discrimination take place, such as contractors' acceptance of high bids from non-minority-owned firms.[501]

The Supreme Court has allowed various types of proof to be introduced in jurisdictions' attempts to show the existence of intentional race and gender discrimination. It has considered evidence of discrimination in areas such as employment, housing and voting rights.[502] In *The Village of Arlington Heights v. Metropolitan Housing Corporation*,[503] the issue before the Supreme Court had to do with whether proof of discriminatory intent was sufficient to show that the Equal Protection Clause had been violated, where the case involved a challenge to a racially-grounded zoning ordinance.[504] The Court set

500. *See id.* at 1172.

501. *See, e.g.*, Builders Ass'n of Greater Chi. v. Cook County, 123 F. Supp. 2d 1087, 1114 (N.D. Ill. 2000). "[T]here [was] virtually no evidence that any general contractor . . . [had] hired a non-M/WBE subcontractor on a private project that was less qualified or higher priced than an available M/WBE subcontractor would have been."

502. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283 (1977).

503. 429 U.S. 252 (1977).

504. *See id.* at 254–65. In *Village of Arlington Heights*, plaintiff housing developer filed a lawsuit, alleging that the Village's decision not to rezone an area for multiple family dwell-

forth a number of factors that could be reviewed to uncover discriminatory animus, such as "[t]he historical background of the decision [to zone or not rezone,] [t]he specific sequence of events leading up to the challenged decisions, . . . [d]epartures from the normal procedural sequence[, and] [t]he legislative or administrative history [behind the decision to zone or not rezone]."[505] These factors, the Court determined, could give rise to circumstantial evidence of the existence of intentional discrimination.[506] The Court also noted that evidence of a stark pattern of denial of certain rights or privileges to only particular groups of people, which was the type of evidence relied upon in earlier Supreme Court cases involving racial gerrymandering and zoning, might serve as a jurisdiction's proof of discriminatory intent.[507]

The Supreme Court has also developed a model for showing disparate treatment in the employment context. In this context, the Court has developed various means of establishing a prime facie case of discrimination based on circumstantial evidence. Sufficient evidence may exist where there is proof that the person that had allegedly been discriminated against was a member of a protected class and was qualified for a particular position, yet was denied access to the position.[508] Additionally, there must be no evidence of any non-racial reason for the employment decision to keep the applicant from ob-

ing was based on race, in violation of the Equal Protection Clause. *See id.* at 557–58. Plaintiff proceeded on both disparate treatment and disparate effects theories. *See id.* at 269. Based on the Supreme Court's decision in *Washington v. Davis*, the Court asserted that proof of discriminatory intent was required in order to show that a violation of the Equal Protection Clause had occurred. *See id.* at 264–65 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). The likely result of the Village's rezoning of the property at issue for multi-family use would have been an increase in the African-American presence in Arlington Heights. *See Village of Arlington Heights*, 429 U.S. at 255.

505. *Village of Arlington Heights*, 429 U.S. at 267–68.

506. *See id.*

507. *See id.* at 564.

508. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978). *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (upholding the use of the disparate impact test under Title VII). *But see* Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983 (1999) (discussing the criticisms of the McDonnell employment model). Although the *McDonnell Douglas* Court laid out a general burden-shifting framework for cases in which the plaintiff relies on circumstantial evidence of discrimination, it did little to explain how future courts should apply this framework. The Court did not explain, for example, whether the defendant's burden to provide a legitimate nondiscriminatory reason for its decision to deny the plaintiff employment was one of production or of persuasion. *See id.* at 987.

taining the position he or she sought.[509] Voluntary affirmative action programs in employment have been upheld, so long as they have not interfered with the interests of other employees, were limited in scope to correct an imbalance in employee make-up, and were temporary.[510]

Finally, in the voting rights context, the Court has also adopted a model of proof regarding discrimination. In *City of Mobile, Alabama v. Bolden*,[511] the Supreme Court declared that proof of discriminatory intent on the part of the jurisdiction that designed the voting plan at issue was necessary to invalidate an at-large voting scheme on the basis that the jurisdiction had discriminated against black voters in the electoral process.[512] In that case, the Court rejected plaintiff's offered circumstantial evidence of the existence of systematic discrimination in the City of Mobile.[513]

However, in a subsequent case, *Rogers v. Lodge*,[514] the Court invalidated a county's electoral scheme, based on plaintiff's circumstantial evidence regarding the existence of discrimination that affected the voting system in Burke County, Georgia.[515] The Court in *Rogers* paid particular attention to the evidence that set forth the history of discrimination affecting blacks in the county in the electoral system.[516] The Court noted that discrimination prior to the passage of the Civil Rights Act, particularly, had suppressed black voter registration and participation in the electoral system.[517] Moreover, the Court relied on the fact that no black had ever been elected for County Commissioner, despite the fact that blacks had run for the position, and despite the very large percentage (38%) of black voters in Burke County.[518] The Court in *Rogers* also looked at the other social factors affecting blacks in the County, such as disproportionate paving of streets and roads in the black community, as compared to the large amount of public works projects initiated in the white community, and lack of suitable plumbing in black homes, both of which demonstrated the existence of discriminatory conditions.[519]

509. *See Green*, 411 U.S. at 802.
510. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979).
511. 446 U.S. 55 (1980).
512. *See id.* at 66. The history of discrimination in Mobile and in Alabama, in general, was an important factor to the lower court. *See id.* at 74.
513. *See id.* at 70.
514. 458 U.S. 613 (1982).
515. *See id.* at 622–24.
516. *See id.* at 624–25.
517. *See id.* at 625.
518. *See id.* at 623–24.
519. *See id.* at 626.

Congress later amended the Voting Rights Act.[520] The amended act did not include an intent standard regarding section two cases, but nonetheless retained some of the factors for a court to consider regarding whether a sufficient showing of circumstantial evidence of discrimination had been demonstrated.[521] These factors, making up what is known as the "totality of circumstances" test and set forth in the Senate Judiciary Committee Majority Report accompanying the bill that amended the Act,[522] include: the history of official discrimination affecting voting; the extent to which the particular state or subdivision is racially-polarized; whether voting procedures that serve to enhance the opportunity for discrimination exist; whether minorities have been excluded from the voting process, if one existed; and the extent to which the effects of discrimination have hindered the ability of minorities to participate in the political process.[523] The alleged compelling interest of using race as a basis for drawing redistricting lines to further minority-voting interests is also subject to *Croson* and *Adarand* type strict scrutiny.

What is clearly lacking in the *Croson* and *Adarand* context, as compared to the above-mentioned contexts, is an evidentiary framework for determining the weight of circumstantial evidence of discrimination in the public and private contracting markets. What evidence will give rise to an inference of discrimination sufficient to establish the "strong basis in evidence" standard in the *Croson* and *Adarand* context? How can proof of the existence of discrimination be established after a jurisdiction has developed a successful MWBE program, which has enhanced the utilization rate of MWBEs? Will failure to solicit bids from MWBEs, and subsequent failure to hire such firms, raise an inference of discriminatory motive, when the same firms are hired or used only to satisfy MBE program demands?

In the midst of these unresolved questions, it is clear that courts are refusing to view evidence of discrimination differently than in the past, regarding legislative acts that are designed to remedy past discrimination. As commentator Michael Selmi has opined:

> As a practical matter, the result is that the Court now sees unlawful discrimination in the affirmative use of race, as occurs in the affirmative action cases or through racial redistricting, but is much less likely to identify discrimination in cases in which African-Americans are the victims of subtle discrimination. Indeed, despite a

520. 42 U.S.C. § 1973 (2000).
521. *See id.* at §§ 1973(a), (b).
522. S. REP. No. 77-417, *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.
523. *See id.* at 28–29.

> broad consensus that discrimination today is generally perpetrated through subtle rather than overt acts, the Court continually refuses to adapt its vision to account for the changing nature of discrimination; as a result, it appears unable to see discrimination that is subtle rather than overt.[524]

Selmi went on to say that the Court has not changed its way of viewing the existence of discrimination since more blatant forms of overt discrimination existed in the 1960s "when explicit barriers prevented African-Americans . . . from fully participating in social and economic life."[525] Although employers no longer place "do not apply" signs upon their doors, discrimination in the business marketplace continues to flourish. Such discrimination involves stereotypical attitudes among contractors, closed networks of associates, and unequal access to credit, loans, bonds, and insurance for MWBEs.

Discriminatory conditions such as outright denials of opportunities to bid or other "smoking gun" types of conditions will rarely exist in the post-*Croson* cases involving jurisdictions' attempts to justify race-based remedial relief. However, few would argue that discrimination is non-existent in the day-to-day contracting business. As Justice O'Connor, writing for the Court in *Adarand III,* stated, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[526]

Most local jurisdictions have been unable to support a factual predicate that is based upon studies showing minority underutilization. This is largely due to challenges jurisdictions have faced regarding the validity of their statistical methodologies for determining disparity amounts regarding minority underutilization in public sector contracting. As various congressional findings have indicated, private sector discrimination remains a present day reality for MWBEs. Remedying the discrimination that is perpetrated against these firms in the private sector is a compelling state interest, at least according to a plurality of the Court in *Croson.*[527]

It has been argued that the government should be able to make "but-for availability adjustments" to counteract the effects of private discrimination against minority businesses.[528] Local jurisdictions

524. Selmi, *supra* note 502, at 284.
525. *Id.*
526. *Adarand I,* 515 U.S. at 237.
527. *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 492 (1989).
528. *See* Ayers & Vars, *supra* note 12, at 1586.

should be required to develop empirical data to document the underutilization of MWBEs in private sector contracting and should be able to use statistical regression analyses to establish discriminatory patterns, as courts have required jurisdictions to do in voting rights cases. Jurisdictions' reliance on census data to show the respective private market share of MWBEs being utilized may be one method jurisdictions could use to establish discriminatory patterns. However, some courts have disavowed this method because of its inability to accurately portray actual availability, with regards to the firms that actually bid on contracts. Such empirical data will be difficult to prove when some contractor associations and members withhold private job bidding data. Congressional findings of national discrimination based on local evidence, should, however, be admissible, for the purpose of bolstering a factual predicate of discrimination in certain areas, such as bonding, and access to capital and insurance.

One local jurisdiction, the City of Atlanta, recently developed an equal business opportunity ("EBO") program, predicated largely on evidence of private sector discrimination.[529] The program was adopted in 2001, following the release of the results of a statistical disparity study which found that "African Americans, Hispanic and female-owned businesses in the Atlanta Region suffer economic disadvantage relative to similarly situated white-male firms, as a result of discrimination by race, gender and ethnicity."[530] The study also found that annual revenues for African-American, Hispanic, and female-owned businesses for certain industry classifications were statistically significantly lower than would be expected of such firms of a particular size and age.[531] The purpose of the program, according to its policy statement, was to "ensure that the City of Atlanta [was] not a passive participant in ongoing private sector discrimination and to promote equal opportunity for all businesses in the Atlanta region."[532]

The city adopted the program prior to the termination of its previous goal-based ordinance, which had been the subject of a federal lawsuit challenging the program's constitutionality.[533] The cornerstone of the new program was the requirement that potential bidders demonstrate that at least once during a two-year period they had uti-

529. ATLANTA, GA., CODE OF ORDINANCES, art. X, div. 12 (2003).

530. *Id.*

531. *See id.*

532. *Id.*

533. *See id.*

lized MWBEs for subcontracts on private jobs.[534] If the potential bidder could not show such prior utilization, then it was required to evince documented good faith outreach efforts to identify and contract with MWBEs as subcontractors or for supplies for projects undertaken in the public or private sector.[535]

The Atlanta EBO program was predicated on the *Croson* plurality opinion, where Justice O'Connor had written that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry . . . the city could take affirmative steps to dismantle such a system."[536]

Federal courts of appeals have endorsed this approach, yet no local jurisdiction has been able to demonstrate the requisite showing of passive participation in discrimination in the private sector. The district court in the *Webster* case found that defendant Fulton County had not actively furthered or facilitated private sector discrimination and that the city's expert had improperly relied upon general local marketplace data, because the data made no showing of a link between itself and private sector discrimination.[537]

Likewise, in *Builders Association*, the district court found that defendant county had not established a factual predicate showing of private sector discrimination sufficient to support its MWBE program.[538] The court found that general contractors' failure to solicit MWBEs was not equivalent to a discriminatory denial of opportunity to bid.[539] The court subsequently found that there was no proof that general contractors had engaged in a pattern of refusing to hire, or had failed to consider hiring, MBE subcontractors.[540] The court also determined that there were "legitimate explanations for [plaintiff's witnesses'] election not to solicit bids on private work from these M/WBE subcontractors."[541]

In *Concrete Works*, the City and County of Denver defended its program in part based on the alleged existence of private discrimination in the Denver metropolitan statistical area's ("MSA") construction in-

534. *See id.*
535. *See id.*
536. City of Richmond v. J.A. Croson, 488 U.S. 469, 492 (1989).
537. *See* Webster v. Fulton County, Ga., 51 F. Supp. 2d 1354, 1368–69 (N.D. Ga. 1999).
538. *See* Builders Ass'n of Greater Chicago v. Cook County, 123 F. Supp. 2d 1087, 1116 (N.D. Ill. 2000).
539. *See id.* at 1113.
540. *See id.*
541. *Id.* at 1114.

dustry.[542] There, the court found that the MWBE disparity indices for the Denver MSA, which combined evidence of public and private sector underutilization of MWBEs, gave rise to an inference of racial and gender discrimination perpetrated by local prime contractors.[543] The court of appeals held, however, that the Denver data did not show any exact linkage between the way in which Denver awarded its public contracts and Denver's MSA evidence of industry-wide discrimination.[544] While the court of appeals did not read *Croson* as requiring an exact linkage between the way in which Denver decided to award its public contracts to MWBEs and the specific private discrimination sought to be remedied, it noted that *Croson* had determined that "such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program."[545] The record in *Concrete Works*, according to the appeals court, did not sufficiently explain Denver's role in the underutilization of MWBEs in the private construction market.[546] The court, therefore, reversed summary judgment for Denver and remanded the case, with instruction to the lower court to explore all the factual issues surrounding the issue of private sector discrimination at trial.[547]

On remand from the court of appeals, in *Concrete Works III*, the district court found that the City of Denver had not presented a strong basis in evidence sufficient to justify its MWBE program.[548] In examining various disparity studies offered by the city, the court found that defendant's evidence failed to satisfy six questions, which the court had proposed as a litmus test to evaluate the evidence of discrimination.[549] The court further found that defendant had im-

542. *See* Concrete Works of Colo., Inc., v. City and County of Denver, 36 F.3d 1513, 1523 (10th Cir. 1994).

543. *See id.* at 1529.

544. *See id.*

545. *Id.*

546. *See id.* at 1529–30.

547. *See id.* at 1531. Commentators Ayers and Vars noted that an "indirect causation" rationale sets forth the theory that the "government has a compelling interest in ensuring that public money does not directly cause private discrimination." *See* Ayers & Vars, *supra* note 12, at 1601.

548. *See* Concrete Works of Colo. v. City & County of Denver, Colo., 86 F. Supp. 2d 1042, 1079 (D. Colo. 2000).

549. *See id.* at 1066. The following are three of the six questions:

> (1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA? (2) Does such discrimination equally affect all the racial and ethnic groups designated for preference by Denver and all women? (3) Does such discrimination result from policies and practices intentionally used by business firms

properly used marketplace data, rather than evidence of underutilization of MWBEs by the City and County of Denver itself.[550]

On appeal, after the district court had invalidated Denver's program, the Tenth Circuit reversed, finding that the district court's reliance on the six questions was misplaced and improperly required Denver to prove the existence of discrimination.[551] In response to the district court's first question, as to whether there was pervasive race, ethnic or gender discrimination throughout the construction and design industry in the Denver MSA, the appeals court stated, "Instead of asking whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the question asks whether Denver's evidence shows that there is pervasive discrimination."[552] The court in *Concrete Works IV* determined that this improperly placed the burden of proof on the defendant.[553]

The court also rejected the lower court's requirement that the city demonstrate which firms in the private marketplace actively engaged in discrimination.[554] The court stated, "Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction market," linking its spending to that discrimination;[555] this, the court asserted, could be established through the use of statistical and anecdotal evidence of discrimination.[556]

Additionally, the court held that the district could erred in requiring Denver to show discriminatory motive on the part of private construction firms.[557] The court pointed out that imposing "such a burden on a municipality would be tantamount to requiring direct proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and anecdotal evidence."[558] The court further rejected plaintiff's argument and the district court's conclusion that evidence of private marketplace discrimination was ir-

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for the purpose of disadvantaging those firms because of race, ethnicity and gender?

Id.

550. *See id.* at 1067.

551. *See* Concrete Works of Colo. v. City & County of Denver, Colo., 321 F.3d 950, 970 (10th Cir. 2003).

552. *Id.* at 970.

553. *See id.*

554. *See id.* at 971.

555. *See id.*

556. *See id.*

557. *See id.*

558. *Id.* at 972.

relevant.[559] This was, according to the court, inconsistent with the binding precedent that had been established in *Adarand VII*, where the court held that private marketplace evidence was admissible.[560]

On remand, the City of Denver introduced evidence from trial that included testimony from MWBEs that the city had been a passive participant in a system of racial exclusion practiced by local elements of the industry.[561] Although this evidence alone was insufficient to establish a strong basis in evidence, the appeals court concluded that the anecdotal "evidence [linked] Denver's spending to private discrimination."[562]

Plaintiffs had criticized the city's reliance on studies that purported to show discrimination in lending and in business formation as evidence of private marketplace discrimination.[563] Again, the court rejected plaintiffs' criticisms, noting that circuit court precedent set in *Adarand VII* allowed for the introduction of such evidence for purposes of demonstrating the existence of barriers to business formation and competition among minority firms.[564] Evidence of barriers to MWBE formation was found to be relevant because it showed that discrimination had hindered the ability of MWBEs to bid on public jobs at the initial stages of the subcontracting process.[565]

The court found that Denver's use of evidence of lending discrimination perpetrated by financial institutions supported evidence of private marketplace discrimination, since such discrimination affected business formation down the road.[566] Moreover, the court concluded that evidence that consisted of lending and business formation studies supported Denver's claim that M/WBEs were smaller and less experienced because of marketplace and industry discrimination.[567] The district court had criticized the city's disparity studies for failing to account for firm size and experience.[568]

The *Concrete Works* case is one of very few cases that have sustained a city's attempt to show linkage between the city's passive participation

559. *Id.*
560. *See id.*
561. *See id.* at 976.
562. *See id.* at 977.
563. *See id.* at 978.
564. *See id.*
565. *See id.* at 977.
566. *See id.*
567. *See id.*
568. *See* Concrete Works of Colo. v. City & County of Denver, Colo., 86 F. Supp. 2d 1042, 1057 (D. Colo. 2000) [*Concrete Works III*].

in private marketplace discrimination and the ultimate finding that a strong basis in evidence of discrimination exists. The appeals court gave credence to the anecdotal evidence of discrimination the city had used to supplement its marketplace data.[569] Moreover, the court rejected wholesale attacks on the city's disparity studies, which had treated the size and experience of MWBEs as race-neutral variables, having the possible effect of explaining-away discrimination.[570]

The exact required level of linkage between a showing of discrimination and private sector underutilization remains unclear. In *Builders Association of Greater Chicago v. City of Chicago*,[571] the district court declined to extend a local government's power to remedy private discrimination to situations where evidenced discrimination is presented unconnected to the involved entity.[572] Finding it difficult to draw a line between passive discrimination by a jurisdiction and general societal discrimination,[573] the district court upheld a magistrate's decision to quash a subpoena which sought information from building trade unions regarding minority participation in apprenticeship programs.[574] Defendant City of Chicago had attempted to show evidence of discriminatory exclusion of minorities in the building trade industry.[575] The court noted that a local government could sanction a contractor for carrying out private discrimination against MBEs or could adopt race-neutral programs to assist minority contractors who had individually suffered from the effects of discrimination.[576] However, the district court restricted local jurisdictions' use of general race-based remedies to "instances in which the local government has itself discriminated or has been in some sense complicit in private discrimination."[577]

Conclusion

Counteracting the effects of discrimination against racial minorities, to justify a compelling interest in remedying such discrimination, remains a constitutionally permissible objective under *Croson* and *Adarand*. However, courts have not been given guidance regarding the

569. *See Concrete Works IV*, 321 F.3d 950 at 977.
570. *See id.*
571. 240 F. Supp. 2d 796 (N.D. Ill. 2002).
572. *See id.* at 798.
573. *See id.*
574. *See id.* at 799.
575. *See id.* at 797.
576. *See id.* at 799.
577. *Id.*

level of proof of discrimination they must require from jurisdictions for the courts to be able to evaluate constitutional challenges to MWBE programs. The lower court decisions have been fatal to many local and state governmental programs, but have been favorable to many federal programs that have been backed by a showing of private sector discrimination.

Although the Supreme Court was faced with an opportunity to address the requisite showing of discrimination necessary to justify the federal DBE program in the latest *Adarand* case, it has instead left the waters so muddled that jurisdictions are asked to prove the unprovable—unless of course the discrimination at issue is so apparent that it "walks like a duck." Using the strict scrutiny standard, the Supreme Court has yet to uphold an affirmative action program that was supported by on a government's showing of the past effects of discrimination against racial minorities.[578] What is needed is a structural change regarding the way in which discrimination is evaluated, regarding public and private sector race-based remedies that set out to dismantle race-constructed barriers.

MWBEs continue to face racial and gender discrimination, particularly in the private sector. MWBEs have been successful at securing public sector contracts, at least when the jurisdictions in which they do business employ race and gender-based remedies. Studies have shown, however, that MWBE utilization dramatically decreases when such remedies are not employed. Non-utilization of MWBEs does not equate to discrimination, but jurisdictions should monitor private sector utilization, as the city of Atlanta does.

Jurisdictions should do more to document alleged discriminatory practices. Judicial reliance on verifiable acts of discrimination to establish sufficient proof of discrimination is not required under *Croson.* As the court of appeals stressed in *Concrete Works III,* all that is required is a "stong basis in evidence."

Moreover, general marketplace data, reflecting both public and private sector utilization of MWBEs should be admissible as probative evidence. As the Supreme Court said in *Croson,* statistical evidence may establish a pattern of discriminatory exclusion.[579] However, the Court did not specify any particular type of statistical evidence, regarding how this pattern of discriminatory exclusion may be established. A

578. *See, e.g.,* K.G. Jan Pillai, *Neutrality of the Equal Protection Clause,* 27 HASTINGS CONST. L.Q. 89, 96 (1999) ("Since the *Adarand* decision, the Clinton Administration has lost every case in which it has sought the Supreme Court imprimatur of race conscious programs.").

579. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

model which recognizes the proper role of statistical proof in discrimination cases, such as the models used in the voting and employment contexts, should be employed in the business context. In the business context, however, the model most include a requirement that jurisdictions consider which firms are ready, willing, and able to undertake prime and subcontracting work. Moreover, variables that affect a firm's capacity to be qualified, willing, and able to bid on public contracts must be taken into account, such as firm size, capacity, bonding, and the like. The existence of relevant data, which reflects on the size or experience of firms, and is the result of historical or present discriminatory practices, should be useful in establishing the strong basis in evidence standard. Barriers to business formation or competition, as described by the Tenth Circuit in *Concrete Works III* and *Adarand VII*, are also probative of the existence of private marketplace discrimination.

It is important for the Court to design a more structured framework for lower courts to abide by in assessing the constitutionality of MWBEs. For even now, as we progress into the twenty-first century, it is still difficult to remove what W.E.B. DuBois called the "Veil of Race."